91-714

(1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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October 29, 1991

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QUESTION PRESENTED

Whether the United States Claims Court's decision dismissing petitioner's contract claims for money damages against the United States for lack of jurisdiction and transferring those claims to the United States Court of Appeals for the Ninth Circuit (a court powerless to award money damages) is subject to direct appellate review in the Federal Circuit.

PARTIES

Petitioner is Puget Sound Power & Light Company.* Respondent is the United States, on behalf of the Bonneville Power Administration, a federal agency within the Department of Energy.

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* Puget Sound Power & Light Company has no parent company and no non-wholly owned subsidiaries which have issued shares to the public. Puget's wholly owned subsidiary, Hydro Energy Development Corporation, has a non-wholly owned subsidiary named Hydro West Group, Inc. This representation is made pursuant to Sup. Ct. R. 29.1.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit at issue here was filed, and the mandate issued, on August 1, 1991 (reproduced at Appendix 1). The Federal Circuit amended that decision on September 4, 1991 and issued the amendment as a revised mandate on October 2, 1991. App. 8.

The decision appealed to the Federal Circuit was a 51-page opinion of the United States Claims Court dismissing Puget Sound Power & Light Company's contract claims and transferring them to the United States Court of Appeals for the Ninth Circuit. The Claims Court opinion was filed and judgment was entered on April 30, 1991. That opinion is reported at 23 Cl. Ct. 46 (1991) and reproduced at App. 9; the judgment is reproduced at App. 53.

JURISDICTION

This Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1254(1). The Federal Circuit decision and mandate were entered on August 1, 1991. The decision was amended on September 4, 1991, and the amendment was issued as a revised mandate on October 2, 1991.

PRINCIPAL STATUTE INVOLVED

Title 28 of the United States Code, section 1631, provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or notice for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

STATEMENT OF THE CASE

A. The Nature of Puget's Contract Claims

Puget Sound Power & Light Company ("Puget") is an investor-owned electric utility serving consumers in the State of Washington. Puget purchases a substantial amount of its power under numerous written contracts from the Bonneville Power Administration ("BPA"), a federal agency established within the Department of Energy for the purpose of marketing power generated by federally owned hydroelectric projects in the Pacific Northwest. *See* 16 U.S.C. § 832 *et seq.* BPA's activities

as a marketing agency are essentially commercial in nature, primarily involving the negotiation and performance of contracts for the sale of electric power. *See* 16 U.S.C. § 832d(a).

Puget brought claims against the United States in the United States Claims Court pursuant to the Tucker Act, 28 U.S.C. § 1491, to recover money damages for BPA's breaches of written contracts with Puget. Puget alleged that BPA breached specific contractual provisions requiring BPA to give Puget preferential access over entities outside the Pacific Northwest to power marketed by BPA. Inclusion of the preference provisions within BPA's contracts for the sale of power is required by statute. *See* 16 U.S.C. §§ 837c, 837f.

B. The Basis for Puget's Contract Rights

Prior to 1967, the Pacific Northwest and Pacific Southwest were not electrically interconnected. Because federally owned hydroelectric projects in the Columbia River Basin were generating power in excess of the Pacific Northwest's needs, it was envisioned that this surplus power, or "dump power," could be used in the Pacific Southwest. Sales of surplus power, however, were to be limited to "dump power [that was] not being sold [in the Northwest and that] . . . [was] being dumped into the Pacific Ocean each year because of water going over our dams." 108 Cong. Rec. S15,707 (1962) (Sen. Jackson).

The Pacific Northwest was concerned, however, that its access to one of the region's primary natural resources—inexpensive hydroelectric power—might be impaired by sales to the voracious and lucrative California energy market. *See, e.g.*, 108 Cong. Rec. S15,700 (1962) (Sen. Jackson). Thus, federal legislation enacted in 1964, known as the Regional Preference Act, 16 U.S.C. § 837, authorized the construction of a transmission intertie between the two regions, but included provisions assuring that Northwest utilities would have first call on BPA

power and that only surplus "power which would otherwise be wasted"—dump power—could be sold outside the Pacific Northwest region. 16 U.S.C. §§ 837a, 837c. The Act further required that these "regional preference" rights be made part of BPA's contracts with Northwest power purchasers. 16 U.S.C. §§ 837c, 837f.

By requiring that the preference rights conferred by the Act be affirmatively incorporated into BPA contracts, Congress intended that Northwest power purchasers would have a right to sue BPA for damages in Claims Court should BPA breach its contractual regional preference obligations. Then-BPA Administrator Charles F. Luce, for example, confirmed that Northwest Power purchasers "could use their contracts to go into the Court of Claims and collect damages for breach of contract by the United States" should BPA breach its regional preference obligations. Luce, *Updated Summary of Speeches and Statements by Charles F. Luce*, at 21-22 (March 30, 1962). App. 62. Luce also testified during congressional hearings that if BPA "sold power outside the region that was not really surplus, and later on we became short in the region and a customer in the region was damaged thereby, we [BPA] would be subject to suit." *Hearings on S. 1007 Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 88th Cong., 1st Sess. 70-71 (1963).

C. The Claims Court Opinion

Puget brought claims for breach of contract against BPA in the United States Claims Court, alleging that BPA had breached the regional preference provisions of its contracts as early as 1982 by, *inter alia*, selling power that was not truly surplus outside the Pacific Northwest and without first offering power to Puget for sale at rates guaranteed under its contracts. App. 58-59. BPA moved to dismiss Puget's claims for lack of subject matter jurisdiction. The Claims Court "granted" the "Government's

motion to dismiss for lack of jurisdiction . . . but in lieu of dismissal" and on its own motion ordered the case transferred, under 28 U.S.C. § 1631, to the United States Court of Appeals for the Ninth Circuit. App. 52.

In so doing, the Claims Court ignored the contractual basis for Puget's breach of contract claims, and held that these explicit contract provisions did "nothing more than restate a statutory right as required by Congress," and thus created no enforceable contract rights. App. 47; *see also* App. 35. The court in this way recharacterized Puget's contract claims as exclusively statutory claims, that is, claims that BPA was operating in violation of certain provisions of the Regional Preference Act, 16 U.S.C. §§ 837-837h of 1964, and the Northwest Power Act of 1980, 16 U.S.C. §§ 839-839h. App. 35-36. The court concluded that the Northwest Power Act had "impliedly repealed" Claims Court jurisdiction under the Tucker Act to address Puget's claims against the United States for breach of contract and, citing 16 U.S.C. 839f(e)(5), that these contract claims should be heard in the Ninth Circuit under the Administrative Procedure Act review provisions of the Northwest Power Act. App. 31-38, 51-52.

Because the Northwest Power Act addresses *only* APA review of BPA "final actions," however, *see, e.g.*, 16 U.S.C. § 839f(e)(1)-(5), the Claims Court ruling resulted in an erroneous abrogation of Puget's contract rights. The Ninth Circuit cannot award money damages. *See id.*; 5 U.S.C. § 702. Nor can it make factual trial court determinations; it can only apply a more limited APA standard of review. The Claims Court opinion is directly contrary to the Ninth Circuit's ruling in *Public Util. Dist. No. 1 of Clark County v. Johnson*, 855 F.2d 647 (9th Cir. 1988). In that case, the Ninth Circuit transferred to the Claims Court a utility's breach of contract claims against BPA arising from BPA's refusal to acquire a resource, an action identified as a final agency

action in the Northwest Power Act for purposes of APA review. 16 U.S.C. § 839f(e)(1). At the same time the court reviewed, under APA standards, whether the very same actions violated the Northwest Power Act. 855 F.2d at 650-51.

While the Claim Court's decision conflicts with Ninth Circuit precedent, it also ignores this Court's repeated rulings that implied repeals of the Tucker Act are disfavored and allowed *only* if the subsequent act or its legislative history manifests an "unambiguous intention" to repeal Tucker Act jurisdiction. *E.g., Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 110 S. Ct. 914, 922 (1990); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-19 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 137 (1974).

Neither the Northwest Power Act nor its legislative history suggests that that Act was intended to abrogate Tucker Act jurisdiction. To the contrary, the Act: (1) reaffirmed and expanded the contractual regional preference protections previously guaranteed by the Regional Preference Act (*see* 16 U.S.C. § 839c(f); S. Rep. No. 272, 96th Cong., 1st Sess. 34 (1979); H.R. Rep. No. 976, 96th Cong., 2d Sess., pt 1, at 71 (1980)); (2) stipulated with respect to "[r]ights and obligations under existing contracts" that "[n]othing in this chapter shall alter, diminish or abridge the rights and obligations" of BPA under existing contracts (16 U.S.C. § 839g(b)); and (3) expressly addressed its impact on "[e]xisting law" without as much as hinting that Tucker Act jurisdiction is repealed (Pacific Northwest Power Planning and Conservation Act, Pub. L. No. 96-501, 1980 U.S. CODE CONG. & ADMIN. NEWS 2697, 2728-29 (1980).

The Claims Court ruling also wholly ignores settled law that incorporation of statutory or regulatory provisions into contracts gives rise to conventional legal remedies, that is, money damages through *de novo* trial court proceedings, not APA reviews. *See, e.g., National Leased*

Hous. Ass'n v. United States, 22 Cl. Ct. 649, 655 (1991); *County of Suffolk v. United States*, 19 Cl. Ct. 295 (1990); *Grav v. United States*, 14 Cl. Ct. 390 (1988), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989); *Nutt v. United States*, 12 Cl. Ct. 345, 353, *aff'd sub nom. Smithson v. United States*, 847 F.2d 791 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); *City of Fulton v. United States*, 230 Ct. Cl. 635, 641 (1982), *rev'd on other grounds*, 475 U.S. 657 (1986); *California v. United States*, 213 Ct. Cl. 329, 343, *cert. denied*, 434 U.S. 857 (1977); *Cramp Shipbuilding Co. v. United States*, 122 Ct. Cl. 72, 96-97 (1952); *Portsmouth Redevelopment & Hous. Auth. v. Pierce*, 706 F.2d 471, 475 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983). Puget's contract claims here thus should have been resolved by the Claims Court—the only court which can grant Puget the money damages it seeks and to which it is entitled. If the rule were otherwise, Congress's directive that regional preference provisions be protected by contract—and the contract provisions themselves—would be superfluous.

The Claims Court decision was clearly wrong and should have been immediately remedied on appeal to the Federal Circuit. Had the Claims Court simply dismissed Puget's claims, the Federal Circuit would have had to review the decision on the merits. But instead of dismissing, the Claims Court, on its own motion and without request from either party, transferred the case to the Ninth Circuit.

D. The Federal Circuit Opinion

Puget appealed the Claims Court's ruling to the Federal Circuit, asserting jurisdiction under 28 U.S.C. § 1295(a)(3). BPA filed a motion to dismiss the appeal, asserting that the Claims Court decision was interlocutory and not subject to review.[1] The Federal Circuit granted

[1] BPA also argued that Puget's appeal was not timely. This theory was apparently based on BPA's erroneous assumption that

BPA's motion, holding that the § 1631 transfer order was effectively reviewable on appeal from final judgment, App. 3-4, and therefore was an interlocutory nonappealable order. The Federal Circuit stated that the Ninth Circuit can examine its own jurisdiction over the claims "sua sponte, or by a motion to dismiss," or by a motion to retransfer the case to the Claims Court.[2] App. 4. The Federal Circuit thus held that review by the Ninth Circuit through these mechanisms would constitute "effective review" of the Claims Court decision under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The court's opinion was wholly silent on the conflict among the courts of appeals over whether a transfer order under § 1631 is a final and appealable order (*compare Gower v. Lehman*, 799 F.2d 925, 927 (4th Cir. 1986) (§ 1631 transfer order held immediately appealable) *with Middlebrooks v. Smith*, 735 F.2d 431, 433 (11th Cir. 1984) (§ 1631 transfer order held not appealable)), a conflict briefed extensively by the parties.

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the case was docketed on transfer in the Ninth Circuit prior to the time that Puget's notice of appeal was filed. Puget filed its notice of appeal on May 6, 1991, the same day that it first received notice of the judgment. App. 69. The case was docketed by the Ninth Circuit on May 8, 1991 (*see* Decl. of Ninth Circuit Deputy Clerk, App. 74). There is no question that the docketing date is determinative and that Puget's appeal was timely. *See, e.g., Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1517 (10th Cir. 1991); *Lou v. Belzberg*, 834 F.2d 730, 733 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); *A.C. Nielsen Co. v. Hoffman*, 270 F.2d 693, 695 (7th Cir. 1959). Once the docketing date was established, BPA's argument was mooted and the Federal Circuit did not address it.

[2] Puget filed a motion seeking retransfer, pursuant to the Ninth Circuit's scheduling order, on October 11, 1991. That same date, BPA filed a motion to stay or alternatively to dismiss the action.

REASONS FOR GRANTING THE WRIT

This Court should grant Puget's petition for a writ of certiorari for three reasons. First, whether a transfer under 28 U.S.C. § 1631 is a final and appealable order is an issue on which there is a square conflict of authority among the courts of appeals. Second, the Federal Circuit's opinion has decided a federal question in a way that conflicts with an applicable decision of this Court. Third, the court's refusal to hear Puget's appeal raises important questions of federal law that have not been, but should be, settled by this Court. The decision leaves in place the Claims Court's erroneous interpretation of a federal statute, the Northwest Power Act. The Claims Court has construed that Act to have abrogated important contract rights of BPA customers, a result which will likely impede BPA's ability to carry out its functions since BPA's relationships with its customers are grounded largely in contract. Moreover, the appealability of § 1631 transfer orders also raises important questions of federal law—apart from the conflict among the circuits—that should be addressed by this Court.

A grant of certiorari is particularly appropriate where both important federal questions and a conflict among the circuits are present. *See, e.g., Cottage Sav. Ass'n v. Commissioner*, 111 S. Ct. 1503, 1507 (1991) ("Because of the importance of this issue to the S & L industry and the conflict among the Circuits . . . we granted certiorari").

I. CONFLICT AMONG THE CIRCUITS

A. The Conflict

In holding that a 28 U.S.C. § 1631 transfer order is not appealable, the Federal Circuit in this case added its voice to an already clearly delineated conflict among the circuits. The Third, Fourth, Ninth and District of Columbia Circuits hold that such transfer orders are

immediately appealable. *Gower v. Lehman*, 799 F.2d 925, 927 (4th Cir. 1986) (§ 1631 transfer from district court to Claims Court); *Goble v. Marsh*, 684 F.2d 12, 14-15 (D.C. Cir. 1982) (transfer under § 1406(c), predecessor to § 1631, from district court to Claims Court); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 n.6 (3d Cir. 1991) (reaffirming *McLaughlin, infra*); *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426, 428 n.1 (3d Cir. 1983) (§ 1631 transfer from federal district to state court); *Untalan v. Calvo*, 381 F.2d 228, 230 (9th Cir. 1967) (holding that district court's order transferring case to Island Court of Guam was "a final one, appealable to this court").

The Fifth, Tenth, and Eleventh Circuits, by contrast, hold that § 1631 transfer orders are not appealable. *Persyn v. United States*, 935 F.2d 69, 72-73 (5th Cir. 1991) (§ 1631 transfer from district court to Claims Court); *Alimenta (USA), Inc. v. Lyng*, 872 F.2d 382, 384-85 (11th Cir. 1989) (same); *Raines v. Block*, 798 F.2d 377, 379 (10th Cir. 1986) (same); *Middlebrooks v. Smith*, 735 F.2d 431, 433 (11th Cir. 1984) (§ 1631 transfer of habeas corpus petition between district courts); *Jesko v. United States*, 713 F.2d 565, 568 (10th Cir. 1983) (§ 1406(c) transfer from district court to Claims Court).

B. The Appealability of Section 1631 Transfer Orders Is a Recurring Question

Because of the broad language of § 1631, it is widely used for purposes other than transfer of cases from the Claims Court. In order to effect a transfer, the transferor court need only find a "want of jurisdiction," that the action "could have been brought" in the transferee court, and that it is "in the interest of justice" to transfer the action. 28 U.S.C. § 1631. Consequently, courts have, for example, effected transfers not only upon find-

ing a want of subject matter jurisdiction, but also upon finding a want of personal jurisdiction.[3]

Section 1631 is also frequently used in the context of habeas corpus petitions. District courts addressing their own subject matter jurisdiction over petitions filed by federal prisoners under 28 U.S.C. §§ 2241 and 2255 can transfer the petitions to other district courts, under § 1631, upon finding a lack of jurisdiction. *See, e.g., Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990); *Tumminelli v. United States*, 1991 U.S. Dist. Lexis 8898 (N.D. Cal. 1991). When this situation arose in a district court residing in the Fourth Circuit, the federal prisoner had the option of seeking immediate appellate review. *See Boone v. United States Parole Comm'n*, 648

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[3] *See Ginsberg v. Livestock Express, Inc.*, 1991 Am. Marit. Cas. 565 (E.D. Va. 1990); *Jaffee v. Julien*, 754 F. Supp. 49 (E.D. Pa. 1991); *Cunningham v. Walt Disney World Co.*, 1991 U.S. Dist. Lexis 1967 (E.D. Pa. 1991); *Billings v. Weiler & Co.*, 1990 U.S. Dist. Lexis 17127 (W.D. Mich. 1990); *Composite Marine Propellers, Inc. v. Vanderwoude*, 741 F. Supp. 873 (D. Kan. 1990); *Nolt & Nolt, Inc. v. Rio Grande, Inc.*, 738 F. Supp. 163 (E.D. Pa. 1990); *Chierchia v. Treasure Cay Servs.*, 738 F. Supp. 1386 (S.D. Fla. 1990); *Merit Indus. Inc. v. Hanson Distrib. Co.*, 1989 U.S. Dist. Lexis 14307 (E.D. Pa. 1989); *North Am. Fin. Corp. v. Amgrar Gesellschaft fur Farmlagen*, 702 F. Supp. 1435 (D. Minn. 1989); *THT, Inc. v. Fuvai Elec. Co.*, 1989 U.S. Dist. Lexis 143 (E.D. Pa. 1989); *U.S. Sprint Communications Co. v. Central Air Freight, Inc.*, 1988 U.S. Dist. Lexis 13643 (D. Kan. 1988); *Gehling v. St. George Univ. School of Medicine, Ltd.*, 698 F. Supp. 419 (E.D.N.Y. 1988), *aff'd mem.*, 891 F.2d 277 (2d Cir. 1988); *Hunter v. Lee*, 1988 U.S. Dist. Lexis 9657 (S.D. Ga. 1988); *Deininger v. Deininger*, 677 F. Supp. 486 (N.D. Tex. 1988); *IFG Leasing Co. v. Tibbetts*, 675 F. Supp. 547 (D. Minn. 1987); *MMR Holding Corp. v. Sweetser*, 675 F. Supp. 326 (M.D. La. 1987); *Tandy Corp. v. Commus Int'l, Inc.*, 704 F. Supp. 115 (N.D. Tex. 1987); *GAMXX Energy Inc. v. Frost*, 668 F. Supp. 541 (M.D. La. 1987); *Wesley v. H&D Wireless Ltd. Partnership*, 678 F. Supp. 1540 (D.N.M. 1987); *Knoblett v. Kinman*, 623 F. Supp. 805 (S.D. Ind. 1985); *Tellschow v. Aetna Casualty & Sur. Co.*, 585 F. Supp. 593 (S.D. Fla. 1984); *Starline Optical Corp. v. Caldwell*, 598 F. Supp. 1023 (D.N.J. 1984); *Bally/Midway Mfg. Co. v. Regan*, 565 F. Supp. 1045 (Ct. Int'l Trade 1983).

F. Supp. 479 (D. Md. 1986) (considering transfer of a § 2241 petition under § 1631). But in the Eleventh Circuit, the prisoner was specifically denied an immediate appeal. *Middlebrooks v. Smith*, 735 F.2d 431 (11th Cir. 1984).

Section 1631 is also used to remedy procedural problems arising from actions belonging in state courts and subsequently removed under 28 U.S.C. § 1441 to the wrong federal court. *See, e.g., Piazza v. Upjohn Co.*, 570 F. Supp. 5 (M.D. La. 1983); *see also MMR Holding Corp. v. Sweetser*, 675 F. Supp. 326 (M.D. La. 1987); *GAMXX Energy, Inc. v. Frost*, 668 F. Supp. 541 (M.D. La. 1987).

Finally, because of the carefully defined jurisdiction of the Claims Court, orders transferring cases from that court under § 1631 have been and will continue to be common.[4] Claims Court orders retransferring cases also

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[4] *See, e.g., Froudi v. United States*, 22 Cl. Ct. 290 (1991); *Moore v. United States*, 21 Cl. Ct. 537 (1990); *Montalvo v. United States*, 17 Cl. Ct. 744 (1989); *Gutwein v. United States*, 17 Cl. Ct. 720 (1989); *Atlas Corp. v. United States*, 15 Cl. Ct. 681, *aff'd*, 895 F.2d 745 (Fed. Cir.), *cert. denied*, 111 S. Ct. 46 (1990); *Jo-Mar Corp. v. United States*, 15 Cl. Ct. 602 (1988); *Llamera v. United States*, 15 Cl. Ct. 593 (1988); *Doko Farms v. United States*, 13 Cl. Ct. 48 (1987); *Montego Bay Imports, Ltd. v. United States*, 10 Cl. Ct. 806 (1986); *Omega World Travel, Inc. v. United States*, 9 Cl. Ct. 623 (1986); *Consortium Venture Corp. v. United States*, 5 Cl. Ct. 801 (1984), *aff'd mem.*, 765 F.2d 163 (Fed. Cir. 1985); *Whitey's Welding & Fabrication, Inc. v. United States*, 5 Cl. Ct. 284 (1984); *Space Age Eng'g, Inc. v. United States*, 2 Cl. Ct. 741 (1983); *Schmidt v. United States*, 3 Cl. Ct. 190 (1983); *John C. Grimberg Co. v. United States*, 1 Cl. Ct. 253 (1982), *aff'd*, 702 F.2d 1362 (Fed. Cir. 1983).

Claims Court transfers under 28 U.S.C. § 1506, a predecessor statute to § 1631, also occurred with some regularity. *See, e.g., New Orleans Stevedoring Co. v. United States*, 439 F.2d 89 (5th Cir. 1971); *Berdick v. United States*, 222 Ct. Cl. 94 (1979); *Metsch v. United States*, 204 Ct. Cl. 35 (1974); *Northwest Marine Iron Works v. United States*, 203 Ct. Cl. 629 (1974); *Buck Kreihs Co. v. United*

occur frequently.[5] Without the option of immediate appeal, those cases transferred or retransferred by the Claims Court will suffer from the extraordinary time, expense, and delays inherent in the perpetual game of "jurisdictional ping pong" of transfer and retransfer mo-

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States, 192 Ct. Cl. 297 (1970); *Luckenbach S.S. Co. v. United States*, 155 Ct. Cl. 81 (1961).

In numerous other cases, the Claims Court has considered, but declined, transfer. *See, e.g., Amos v. United States*, 22 Cl. Ct. 724 (1991); *Shelden v. United States*, 19 Cl. Ct. 247 (1990); *Cavin v. United States*, 19 Cl. Ct. 190 (1989); *Ayala v. United States*, 16 Cl. Ct. 1 (1988); *Hedman v. United States*, 15 Cl. Ct. 304 (1988); *Deems Lewis McKinley v. United States*, 14 Cl. Ct. 418 (1988); *Hamlet v. United States*, 14 Cl. Ct. 62 (1988), *vacated*, 873 F.2d 1414 (Fed. Cir. 1989); *Last Chance Mining Co. v. United States*, 12 Cl. Ct. 551 (1987), *aff'd mem.*, 846 F.2d 77 (Fed. Cir.), *cert. denied*, 488 U.S. 823 (1988); *Jackson v. United States*, 10 Cl. Ct. 691 (1986); *Pope v. United States*, 9 Cl. Ct. 479 (1986); *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596 (1985); *Williams Int'l Corp. v. United States*, 7 Cl. Ct. 726 (1985); *Standard Mfg. Co. v. United States*, 7 Cl. Ct. 54 (1984); *Andrews v. United States*, 6 Cl. Ct. 204 (1984), *aff'd mem. sub nom. Burden v. United States*, 770 F.2d 179 (Fed. Cir. 1985); *Singleton v. United States*, 6 Cl. Ct. 156 (1983); *McGee v. United States*, 5 Cl. Ct. 480 (1984); *Schuenemeyer v. United States*, 4 Cl. Ct. 649 (1984); *Hargrove v. United States*, 1 Cl. Ct. 228 (1982).

[5] *See, e.g., Hicks v. United States*, 23 Cl. Ct. 647 (1991); *Phipps v. United States*, 21 Cl. Ct. 729 (1990); *Johnson City Medical Center Hosp. v. United States*, 20 Cl. Ct. 515 (1990); *American Lifestyle Homes, Inc. v. United States*, 17 Cl. Ct. 711 (1989); *A & S Council Oil Co. v. United States*, 16 Cl. Ct. 743 (1989); *MacMurray v. United States*, 15 Cl. Ct. 323 (1988); *Bienville v. United States*, 14 Cl. Ct. 440 (1988); *McCann v. United States*, 12 Cl. Ct. 286 (1987); *Martin v. United States*, 7 Cl. Ct. 287 (1985); *Manning v. United States*, 7 Cl. Ct. 128 (1984). The Claims Court has also considered, and rejected, retransfer in other cases. *See, e.g., Rodriguez v. United States*, 13 Cl. Ct. 399 (1987), *rev'd*, 862 F.2d 1558 (Fed. Cir. 1988); *Little River Lumber Co. v. United States*, 7 Cl. Ct. 492 (1985); *Wheeler v. United States*, 3 Cl. Ct. 686 (1983); *Alford v. United States*, 3 Cl. Ct. 229 (1983); *F. Alderete Gen. Contractors, Inc. v. United States*, 2 Cl. Ct. 184, *rev'd*, 715 F.2d 1476 (Fed. Cir. 1983).

tions, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988), not to mention the lack of effective appellate review.

The federal courts' use of § 1631 to cure jurisdictional problems is constant and recurring. Continuing the disuniformity among the circuits over the appealability of § 1631 transfer orders is not only unfair to litigants, but "undermine[s] public confidence in our judiciary," and causes the "squander[ing] of private and public resources." *Christianson*, 486 U.S. at 818-19. Moreover, the conflict among the circuits promotes forum shopping in those cases where the plaintiff has a choice of forum in which to file suit. This Court has repeatedly sought to interpret federal procedural and jurisdictional rules so as to discourage forum shopping. *See, e.g., Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (construing § 1404(a) venue transfer).

C. The Claims Court Transfer Will Be Effectively Unreviewable if Not Reviewed Now

In *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court determined that an order is final and appealable under the collateral order doctrine if it (a) conclusively determines the disputed question, (b) resolves an important issue completely separate from the merits of the action, and (c) is effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand*, 437 U.S. at 458 (citing *Cohen*, 337 U.S. at 346). It is undisputed—and the Federal Circuit did not disagree—that the first two prongs of *Cohen* are met here; the court ruled only that the third prong was not met.

Courts holding § 1631 transfer orders to be appealable have typically applied *Cohen* to find that the order otherwise would be effectively unreviewable from a final judgment. The court in *Gower*, for example, ruled that a transfer from district court to Claims Court was ap-

pealable because "the District Court's determination that it lacks jurisdiction cannot be effectively reviewed on appeal to the Federal Circuit from a final judgment in the Claims Court." *Gower*, 799 F.2d at 927. Likewise, the *Goble* court reasoned that when the time comes for review of the transfer order, " 'it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, perhaps irreparably.' "[6] *Goble*, 684 F.2d at 14 (quoting *Cohen*, 337 U.S. at 546). The Claims Court decision here will be effectively unreviewable if not reviewed now by the Federal Circuit.

First, Claims Court decisions are reviewable only in the Federal Circuit[7] and a transfer order cannot be re-

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[6] While many of the cases cited by the Federal Circuit did not involve transfer orders, all of the cases did involve, or relied upon cases involving, discretionary *forum non conveniens* transfers under 28 U.S.C. § 1404(a) or analogous statutes. Such transfer orders are ordinarily not appealable because they "do not concern challenges to the transferring court's power to transfer," but merely involve a discretionary change of venue to another district court where the action indisputably could have been brought and each court is "presumed to be as able and as well-qualified [as the other] to handle [the] litigation." *Gower*, 799 F.2d at 927. Further, each case relied upon by the Federal Circuit involved transfers between federal district courts where the transferee court's decision on a motion to retransfer would be subject to direct appellate review at the conclusion of the case. *See, e.g., Middlebrooks v. Smith*, 735 F.2d 431, 433 (11th Cir. 1984); *Roofing & Sheet Metal Servs. v. La Quinta Motor Inns*, 689 F.2d 982, 989 (11th Cir. 1982); *D'Ippolito v. American Oil Co.*, 401 F.2d 764, 765 (2d Cir. 1968).

[7] In *United States v. Hohri*, 482 U.S. 64 (1987), this Court recognized that "[a] motivating concern of Congress in creating the Federal Circuit was the 'special need for nationwide uniformity' in certain areas of the law," *id.* at 71, and that "Congress decided to confer jurisdiction on the Federal Circuit in *'all federal contract appeals in which the United States is a defendant.'*" *Id.* at 72 (emphasis added; quoting S. Rep. No. 275, 97th Cong., 2d Sess. 2, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 11, 12; H.R. Rep. No. 312, 97th Cong., 2d Sess. 18 (1981)). The Court further

viewed by the transferee court. 28 U.S.C. § 1295(a)(3); *United States v. Hohri*, 482 U.S. 64, 72 (1987); *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (*en banc*) (and cases cited therein) ("[I]t is well established that a transferee court cannot directly review the transfer order itself"); *Southern Distributing Co. v. E. & J. Gallo Winery*, 718 F. Supp. 1264, 1266 (W.D.N.C. 1989).

Second, this unusual transfer from a trial court to an appellate tribunal in this case is "effectively unreviewable" since all appellate review of right of any jurisdictional determination is precluded—even that which the Ninth Circuit may make as to its own jurisdiction on a motion to retransfer. It is particularly critical that there be a right to direct appellate review of the jurisdictional decision at issue here—whether Puget's contract claims for money damages have been abrogated by the Northwest Power Act—because of the magnitude of the rights at stake and the breadth of the ruling as it applies to BPA's numerous contracts with utilities throughout the Northwest. If certiorari is not granted, there will be no right to a review either of the Claims Court decision or of any Ninth Circuit decision on retransfer.

D. The Subsequent Enactment of Section 1292(d)(4)

The appealability of § 1631 transfer orders is further supported by the later enactment of another federal statute, 16 U.S.C. § 1292(d)(4). The Federal Courts Improvement Act of 1982 created the United States Court of Appeals for the Federal Circuit, a court whose jurisdiction was limited to appeals in specific subject matter areas and from particular courts or tribunals. *See* 28

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noted that "[a] conspicuous feature of these judicial arrangements is the creation of exclusive Federal Circuit jurisdiction over *every appeal* from a Tucker Act or nontax Little Tucker Act claim." *Id.* at 72-73 (emphasis in original). These purposes counsel against relying on a Ninth Circuit decision for retransfer to constitute "effective review" of a substantive decision of the Claims Court.

U.S.C. § 1295. In creating this court of limited jurisdiction, Congress "broadly drafted [the transfer provision] to permit transfer between any two federal courts" to avoid involuntary dismissals of misfiled actions, a problem that accompanies the strict limitation of subject matter to a particular court. S. Rep. No. 275, 97th Cong., 2d Sess., 1982 U.S. CODE CONG. & ADMIN. NEWS 11, 21. Congress later recognized, however, that the transfer statute had spawned confusion as it related to the Federal Circuit's jurisdiction over "Little Tucker Act" cases, actions involving claims for $10,000 or less, which could be brought in either the district courts or Claims Court. 28 U.S.C. § 1346.

Where there was some question as to whether the amount in controversy in a Little Tucker Act district court action exceeded $10,000, the government generally filed a § 1631 motion to transfer to Claims Court. *See* H.R. Rep. No. 889, 100th Cong., 2d Sess. 51, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6012. Since some circuits did not consider the denial of such a motion to be immediately appealable, however, the parties had to await decision on the jurisdictional question until the district court had rendered final judgment. *Id.* at 6013. Because that result caused "wasteful and duplicative litigation on the merits in the wrong trial court" when the district court's order was later reversed, *id.* at 6012, Congress enacted 28 U.S.C. § 1292(d)(4) to address this narrow jurisdictional problem. *Id.* at 6011; *Mitchell v. United States*, 930 F.2d 893, 895 (Fed. Cir. 1991).

Section 1292(d)(4) vests the Federal Circuit with exclusive jurisdiction of appeals from district court orders "granting or denying, in whole or in part," motions to transfer an action to the Claims Court under § 1631. By this statute, Congress allowed immediate appeal of transfers and even denials [8] of transfer motions by a district

[8] Denials of transfer motions were previously considered non-appealable interlocutory orders. H.R. Rep. No. 889, 100th Cong.,

court and removed appellate review of such orders from the circuits governing the district courts to the Federal Circuit.

That § 1292(d)(4) did not explicitly address the appealability of orders transferring cases from Claims Court under § 1631 does not mean that those orders are non-appealable. First, explicit statutory authorization for review of Claims Court decisions in the Federal Circuit was, of course, not necessary as it was for Federal Circuit review of district court orders outside its previously established appellate jurisdiction.

Second, because Congress was concerned with the narrow problem of the proper forum for Little Tucker Act claims, it is not surprising that the statute was not more broadly written to include the appealability of transfers by the Claims Court to other federal courts. Because the Claims Court has subject matter jurisdiction over all Tucker Act claims regardless of amount in controversy, neither the government nor the plaintiff bringing suit would ever have a basis to file a § 1631 transfer motion before the Claims Court grounded on the amount in controversy. Consequently, in the context of review of Little Tucker Act cases (the only issue before Congress in its enactment of § 1292(d)(4)), the issue of appellate review of Claims Court transfer orders simply did not arise.

Congress enacted § 1292(d)(4) "'[i]n the interests of resolving jurisdictional questions at the outset of litigation and thereby avoiding wasteful and duplicative litigation on the merits in the wrong trial court . . .'" and "expedit[ing] resolution of complex Tucker Act disputes." *Mitchell v. United States*, 930 F.2d at 895 (quoting H.R. Rep. No. 889, 100th Cong., 2d Sess. 52, *reprinted in* 1988 CODE CONG. & ADMIN. NEWS 5982, 6012). The enactment of § 1292(d)(4) thus supports the view favor-

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2d Sess. 52, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6012.

ing appealability of § 1631 Claims Court transfer orders. It would be inconsistent to construe Congress's obvious desire to expedite appellate review of transfers between the district courts and Claims Court by denying appeal to Claims Court transfers, while at the same time allowing immediate appellate review of district court rulings granting or denying transfer to Claims Court.

II. CONFLICT WITH THIS COURT'S PRECEDENT

The decision of the Federal Circuit in this case also conflicts with this Court's holding that orders remanding removed actions to state court are appealable where, as part of its remand reasoning, the district court decides controlling issues of substantive law.[9] *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 142 (1934) (district court order dismissing third-party defendant and remanding to state court held final and appealable). This Court held that if the district court, as part of its remand reasoning, decides a controlling issue of substantive law, such ruling is final and can be immediately appealed. *Id.* The Court distinguished the remand from the dismissal (although they were contained in a single order), and held that while ordinarily remand orders themselves are not appealable, failure to allow appeal in this instance would render the order functionally nonreviewable:

> [I]n logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioners.

Id. at 143. Subsequent cases have followed *Waco*.[10]

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[9] A federal district court's order remanding an action to state court is normally nonappealable. 28 U.S.C. § 1447(d).

[10] *See, e.g., Armstrong v. Alabama Power Co.*, 667 F.2d 1385, 1387 (11th Cir. 1982); *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 748-49 (5th Cir. 1975). Courts have also applied *Waco* in analogous

In the instant case, the court explicitly "granted" BPA's Motion to Dismiss Puget's claims for lack of subject matter jurisdiction. App. 52. The Claims Court's dismissal based on lack of subject matter jurisdiction was a necessary predicate to the § 1631 transfer. As the court in *Pelleport* explained:

> The confusion appears to be generated by the label of remand. Once the fact of remand is separated from the reason for its issuance, however, it becomes clear that the district court did not merely remand this case to the state court; it reached a substantive decision on the merits apart from any jurisdictional decision.

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circumstances. *See, e.g., Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 553-54 (9th Cir. 1991) (remand order based on application of parties' forum selection clause); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 n.6 (3d Cir. 1991) (same); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984) (same); *Regis Assoc. v. Rank Hotels, Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990) (same); *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988) (same); *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705, 708 (7th Cir. 1991) (summary judgment order dismissing federal claims and remanding case); *Burns v. Watler*, 931 F.2d 140 (1st Cir. 1991) (order granting stay pending outcome of state action); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267, 271 (7th Cir. 1990) (reviewing dismissal of claims underlying remand order and noting that "[g]enerally, courts have heard appeals from a district court's decision on the merits of a removed case, even where the district court has already purported to remand the case back to state court"); *Mitchell v. Carlson*, 896 F.2d 128, 132-33 (5th Cir. 1990) (appeal of order vacating prior order substituting United States for individual defendant); *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985) (remand order based on alleged waiver of right to removal); *In re Romulus Community Schools*, 729 F.2d 431, 440-41 (6th Cir. 1984) (remand order based on dismissal of federal claim in multiclaim suit); *Kozera v. Spirito*, 723 F.2d 1003, 1005 n.1 (1st Cir. 1983) (remand order based on dismissal on sovereign immunity grounds). *See also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (district court's order staying action pending outcome of state suit final and appealable).

741 F.2d at 276. The transfer mechanism should not convert an otherwise appealable decision into an interlocutory order.

III. THIS CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW

Two important questions of federal law that have not been, but should be, settled by this Court arise in this case. First, the appealability of transfer orders under § 1631, for which review would otherwise be "lost, probably irreparably," *Cohen*, 337 U.S. at 546, raises serious federal concerns apart from the need to resolve a conflict between the circuits. These issues relate not only to the potential loss of rights grounded in federal law, but also to the administration and use of the resources of the federal judicial system.

Second, the Federal Circuit's decision leaves in place the Claims Court's novel conclusion that the contract rights of holders of BPA contracts have been abrogated by the Northwest Power Act, 16 U.S.C. § 839 *et seq.* Review should be granted in this case because the federal questions at stake are both substantial and recurring. This case raises important issues in the administration of BPA's contracts and of the Northwest Power Act. *See United States v. An Article of Drug*, 394 U.S. 784, 791 (1969) ("We granted the government's petition for certiorari because this interpretation of the Act raised issues of importance in the administration of the Federal Food, Drug, and Cosmetic Act"). This Court has previously recognized the importance of properly construing the Northwest Power Act and addressing the legal relationships between BPA and its customers under that Act. *See Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984).

The Federal Circuit's refusal to take jurisdiction over Puget's appeal will cause Puget's breach of contract claims against BPA to remain forever without a forum.

This is because of the limited jurisdiction Congress has vested in the Ninth Circuit under the Northwest Power Act. The Ninth Circuit's review as an appellate court is specifically limited, under the Northwest Power Act, to APA review of final agency action. *See, e.g.*, 16 U.S.C. § 839f(e)(1), (2); *Public Util. Dist. No. 1 of Clark County v. Johnson*, 855 F.2d 647, 649 (9th Cir. 1988). Since the Ninth Circuit's APA review is available only for actions "seeking relief *other than* money damages," 5 U.S.C. § 702 (emphasis added), the Ninth Circuit cannot resolve Puget's breach of contract claims. The Ninth Circuit has therefore held that where the basis of a suit against BPA is breach of contract, suit must be brought in the Claims Court since "[t]here is nothing in the language or legislative history of either the [Northwest Power] Act or the Tucker Act indicating that Congress intended to provide for concurrent jurisdiction in this court and the claims court over claims where the agency's action involves contractual dealings." *Id.* at 650.

The Federal Circuit decision also means that BPA may now act with impunity in contravention of the contractual rights of any entity with which it contracts. BPA claims in this case that breach of contract actions for money damages cannot be brought against BPA in Claims Court. BPA previously successfully argued that breach of contract claims against it for money damages cannot be maintained in the Ninth Circuit. In its briefing to the Ninth Circuit in *Atlantic Richfield Co.* v. *BPA*, 818 F.2d 701 (9th Cir. 1987), for example, BPA argued that "[s]ince monetary relief is unavailable under the APA it is also unavailable [in the Ninth Circuit] under the Northwest Power Act."[11] App. 65. BPA thus urges, and the Claims Court has ruled, that there is no forum in which to bring breach of contract claims

[11] BPA represented to the Ninth Circuit in that case that for breach of contract claims, "the Tucker Act vests exclusive jurisdiction in the U.S. Claims Court." App. 64

against BPA for monetary relief although BPA's relationships with its customers are largely based in contract. This result is absurd, and its impact is far reaching.

Further, while the Ninth Circuit cannot resolve Puget's breach of contract claims for money damages against BPA, the court might assert limited jurisdiction to review BPA's actions for compliance with APA standards without, of course, resolving the breach of contract issues. Thus, while Puget has not sought APA review, and has so advised the Ninth Circuit in its motion to retransfer, the Ninth Circuit could conceivably determine that it has some APA review power over some issues. BPA has, for example, asked the Ninth Circuit in its October 11th motion to stay the Ninth Circuit proceedings to consider Puget's claims only after BPA has concluded its "agency proceeding" on the formulation of BPA's future administrative policy on sales outside the region [12] and then to consider Puget's claims only in the context of APA review. Puget's contract claims for money damages could languish in the Ninth Circuit while years of APA review proceed. At the conclusion of APA review, Puget's only option would be to seek certiorari in this Court for, *inter alia*, the failure of any court to address the merits of its contract claims.

Puget would by then have lost any right to direct review of the Claims Court's dismissal of its contract

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[12] Prior to commencing this lawsuit in Claims Court, Puget notified BPA that it believed BPA was breaching Puget's contracts and on several occasions discussed with BPA Puget's intention to file a lawsuit for damages. BPA attempted to preempt that lawsuit by initiating an "agency proceeding" in which BPA claimed it would develop a "policy" for future sales of surplus power. 55 Fed. Reg. 6,420 (1990). As Puget established by affidavit in the Claims Court, BPA's agency proceeding was initiated "by BPA in response to Puget's expressed intention to file this lawsuit." App. 66. In its voluminous submissions to the Claims Court and the Federal Circuit over the course of more than a year, BPA has never denied that its "agency proceeding" was initiated in an attempt to preempt Puget's lawsuit.

claims, and Puget would have no right to direct review of any Ninth Circuit decision on Puget's retransfer motion. While BPA argued to the Federal Circuit that a petition for certiorari constitutes "effective review," the Federal Circuit conspicuously declined to adopt that reasoning and no reported case has so ruled. This is not surprising given the discretionary nature of the writ.

Further, the Federal Circuit noted in its decision:

> The Supreme Court has stated that law of the case principles apply to transfer orders; "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2179 (1988). However, there may be situations "in which the transferee court considers the transfer 'clearly erroneous' " and thus dismissal or retransfer for lack of jurisdiction is appropriate. *Id.*

App. 4. While Puget believes that the Ninth Circuit's review of its jurisdiction in considering a retransfer motion should be *de novo*, BPA will undoubtedly argue that, according to its reading of the Federal Circuit's order and *Christianson*, the Ninth Circuit's scope of review is severely limited, thus further restricting consideration of this important jurisdictional ruling.

If the Ninth Circuit does view the Claims Court transfer as erroneous, it cannot take jurisdiction of the case to resolve it on the merits. *See Christianson*, 486 U.S. at 817. Rather, the Ninth Circuit would have to retransfer to the Claims Court, *id.*, or dismiss. A dismissal would give Puget no right to direct review. Nor would retransfer guarantee a different outcome. The Claims Court, having already held in a lengthy opinion that it does not have jurisdiction, cannot assume jurisdiction without first reversing its position. Thus, the Ninth Circuit could consider retransfer to the Claims Court as potentially futile.

Puget's claims are caught in the "jurisdictional ping pong" game of transfer motions between courts on either side of the continent, the situation that this Court abhorred in *Christianson*. *Id.* at 818. Whatever the outcome, the Claims Court's dismissal and transfer of Puget's contract claims are likely to be foreclosed from direct review in any forum unless this Court grants Puget's petition for a writ of certiorari to the Federal Circuit. If the Federal Circuit does not review the Claims Court's opinion, Puget will have lost as of right any access to appellate review of either the Claims Court decision dismissing Puget's claims for lack of subject matter jurisdiction or any Ninth Circuit ruling dismissing or refusing to retransfer Puget's contract claims.

The consequences of the Claims Court's decision, and the Federal Circuit's refusal to review that decision, undermine public confidence in the court system and are an embarrassment to this Court whose responsibility it is to ensure the proper and smooth functioning of the federal courts. *See, e.g., Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation").

CONCLUSION

For the foregoing reasons, this Court should grant Puget's petition for a writ of certiorari to the Federal Circuit for the purpose of vacating that court's order and remanding with instructions to hear the appeal from the Claims Court's dismissal and transfer order on the merits or, in the alternative, for the purpose of plenary review on the issue of the appealability of transfer orders under 28 U.S.C. § 1631.

Respectfully submitted,

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October 29, 1991

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5094

PUGET SOUND POWER & LIGHT COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ON MOTION

Before RICH, MAYER, and CLEVENGER, *Circuit Judges.*

MAYER, *Circuit Judge.*

ORDER

The United States moves to dismiss Puget Sound Power & Light Company's (Puget Sound) appeal from the April 30, 1991 Claims Court order for lack of jurisdiction. Puget Sound opposes. Both parties move for leave to file motions papers in excess of the 10 pages prescribed in Fed. Cir. R. 27(b).

Puget Sound filed suit in the Claims Court alleging that the Bonneville Power Administration (BPA), a federal power marketing agency, had breached contracts with it by marketing power outside of the Pacific Northwest region in contravention of the Pacific Northwest Electric Power Planning and Conservation Act, 16

U.S.C. § 839f(c) (Northwest Power Act), and the Act of August 31, 1964, 16 U.S.C. § 837-837h (Preference Act), two statutory provisions incorporated into the parties' contracts by reference. Puget Sound requested money damages based upon the BPA's alleged violation of the two statutory provisions and declaratory relief "that BPA may not in the future sell or exchange power in violation of the Regional Preference Provisions of its contracts with Puget Power."

The United States moved to dismiss Puget Sound's complaint for lack of jurisdiction arguing that claims under the Northwest Power Act and the Preference Act are within the exclusive jurisdiction of the United States Court Of Appeals for the Ninth Circuit. The Claims Court, in a 51-page order, agreed, determining that the Northwest Power Act expressly states that BPA's extraregional sales of electrical power constitute final actions by the BPA Administrator subject to judicial review and that the Act mandates that suits to challenge "final actions and decisions taken pursuant to this Act by the Administrator . . . shall be filed in the United States court of appeals for the region." 16 U.S.C. § 839f (c). In lieu of dismisasl, however, the Claims Court transferred Puget Sound's action to the Ninth Circuit pursuant to 28 U.S.C. § 1631.

Here, the United States moves to dismiss Puget Sound's appeal on the ground that it is interlocutory and non-appealable. In response, Puget Sound argues that the transfer order is appealable under the collateral order doctrine.[1] *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). To qualify as a collateral order, an order must: (1) conclusively determine the disputed

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[1] Puget Sound also asserts review is warranted because this court "implicitly found that it has jurisdiction to review Claims Court transfer orders under § 1631 as final appealable orders" in *United States v. John C. Grimberg Co.*, 702 F.2d 1362 (Fed. Cir. 1983) (in banc). However, *Grimberg* involved an appeal from the denial of a preliminary injunction in conjunction with a transfer order. *Grimberg*, 702 F.2d at 1363.

question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Focusing on the third factor, the Supreme Court has explained that a decision is only effectively unreviewable on appeal after final judgment "where denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981) *quoting United States v. Ryan*, 402 U.S. 530, 533 (1971). The collateral order doctrine is sparingly applied and even then only to "trial court orders affecting rights that will be 'irretriveably lost' in the absence of an immediate appeal." *Jeanette Sheet Glass Corp. v. United States*, 803 F.2d 1576, 1581 (Fed. Cir. 1986) *quoting Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985).

It is established that a transfer order is interlocutory and generally not appealable under the collateral order doctrine. *See e.g., Dobard v. Johnson*, 749 F.2d 1503, 1507 (11th Cir. 1985); *In re Dalton*, 733 F.2d 710, 715 (10th Cir. 1984); *U.S. Tour Operators Ass'n v. Trans World Airlines*, 556 F.2d 126, 129 (2d Cir. 1977). *See generally* 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 110.13[6] (2d ed. 1991) (orders granting motions for transfer are interlocutory and do not fall under the collateral order doctrine). This was recently reinforced when Congress enacted a law expressly making certain transfer orders appealable. 28 U.S.C. § 1292(d)(4)(A). The order here is not encompassed by that statute.

The collateral order doctrine is not applicable to transfer orders because transfer orders are not "effectively unreviewable on appeal from final judgment." *Coopers & Lybrand*, 437 U.S. at 468. A denial of immediate review would not "render impossible any review whatsoever." *Firestone Tire & Rubber Co.*, 449 U.S. at 376.

The Ninth Circuit may examine whether it has jurisdiction over the case, sua sponte, or by a motion to dismiss.[2] In addition, Puget Sound may obtain review of the jurisdictional issue by moving the Ninth Circuit, the transferee court, to retransfer the case to the Claims Court. *See Middlebrooks v. Smith*, 735 F.2d 431, 433 (11th Cir. 1984); *Roofing & Sheet Metal Serv. v. La Quinta Motor Inns*, 689 F.2d. 982, 989 (11th Cir. 1982); *D'Ippolito v. American Oil Co.*, 401 F.2d 764, 765 (2d Cir. 1968). Immediate review by the Ninth Circuit of either its own jurisdiction and/or a motion to retransfer constitutes "effective review" for purposes of the collateral order doctrine.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' motion to dismiss Puget Sound's appeal is granted.

(2) The United States' and Puget Sound's motions to exceed the page limits are granted.

FOR THE COURT

Aug. 1, 1991
Date

/s/ H. Robert Mayer
H. ROBERT MAYER
Circuit Judge

cc: Terrence S. Hartman, Esq.
Sherilyn Peterson, Esq.

Issued as a Mandate: Aug. 1, 1991

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[2] The Supreme Court has stated that law of the case principles apply to transfer orders; "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Christianson v. Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2179 (1988). However, there may be situations "in which the transferee court considers the transfer 'clearly erroneous'" and thus dismissal or retransfer for lack of jurisdiction is appropriate. *Id.*

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August 2, 1991

Francis X. Gindhart
Clerk, United States Court of
Appeals for the Federal Circuit
717 Madison Place N.W.
Room 401
Washington, D.C. 20439

Re: *Puget Sound Power & Light Company v. The United States*; No. 91-5094

Dear Mr. Gindhart:

I represent the appellant, Puget Sound Power & Light Company ("Puget") in the referenced action. We have reviewed this Court's order dated August 1, 1991 granting the appellee's motion to dismiss this appeal. We have noted a significant error in a statement of fact which we respectfully request be corrected in an amended order.

At pages 1-2 of the order, the Court states that Puget "requested money damages based upon the BPA's alleged violation of the two statutory provisions. . . ." But, as a factual matter, Puget requested money damages for a breach of contract. I enclose herewith a copy of Puget's Complaint filed in Claims Court which shows that Puget's claims for money damages were based on breach of contracts with BPA. (e.g., contract No. 14-03-37050, attached to Puget's Complaint and contract No. DE-MS79-88P92527). Thus, the statement that Puget claimed

money damages based on violation of a statute is incorrect. (Indeed, money damages for violation of a statute are not typically allowed.) We therefore respectfully request that this statement in the order be changed to read "Puget Sound requested money damages based upon BPA's alleged violations of its contracts with Puget . . . ."

The Court made a similar error in the sentence immediately preceding the one cited above. The Court stated that Puget filed suit in Claims Court alleging that BPA breached its contract by marketing power "in contravention of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839f(c) (Northwest Power Act), and the Act of August 31, 1964, 16 U.S.C. § 837-837h (Preference Act), two statutory provisions incorporated into the parties' contracts by reference." Again, in a subtle, but important way, this misstates Puget's claims which were based on breaches of the contracts, not the statutes. Puget respectfully requests that this language be modified to read "Puget Sound filed suit in the Claims Court alleging that the Bonneville Power Administration (BPA), a federal power marketing agency, had breached contracts with it by marketing power outside of the Pacific Northwest region in contravention of its contracts with BPA which incorporated, by reference, provisions of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839f(c) (Northwest Power Act), and the Act of August 31, 1964, 16 U.S.C. § 837-837h (Preference Act)."

The correct factual description of the claim Puget actually made is important in this case. We are not seeking any comment on the merits of Puget's claim, or even whether they are cognizable claims under the law; we seek only to correct the Court's statement of how Puget has pled its claims. Puget has sought money damages for BPA's breaches of contract. It has not sought money damages for a separate violation of any statute. The Court should describe Puget claims as Puget has made

them. We therefore respectfully request that the Court's opinion be amended to accurately state Puget's claims.

Respectfully submitted,

/s/ Sherilyn Peterson
SHERILYN PETERSON

SP:cw
Enclosure

cc: Terrence S. Hartman (w/o encl.)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5094

PUGET SOUND POWER & LIGHT COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ON MOTION

Before MAYER, *Circuit Judge.*

ORDER

Upon consideration of Puget Sound's motion for clarification of the court's August 1, 1991 order,

IT IS ORDERED THAT:

The motion is granted in part; the sentence beginning with "Puget Sound" on page 1, second line from the bottom and continuing on the next page, is deleted through the word "provisions" on page 2, line one and shall now read, "Puget Sound requested money damages based upon BPA's alleged violations of its contract with Puget Sound. . . ."

Sep. 04, 1991
Date

/s/ H. Robert Mayer
H. ROBERT MAYER
Circuit Judge

cc: Terrence S. Hartman, Esq.
Sherilyn Peterson, Esq.

Issued as a Revised Mandate: October 2, 1991

IN THE UNITED STATES CLAIMS COURT

No. 90-193C

(Filed: Apr. 30, 1991)

PUGET SOUND POWER & LIGHT CO.

v.

THE UNITED STATES

Contracts; jurisdiction; challenges to BPA extraregional power sales; Northwest Power Act, 16 U.S.C. § 839f(e) (1988); transfer to Ninth Circuit pursuant to 28 U.S.C. § 1631 (1988).

Sherilyn Peterson, Bellevue, Washington, attorney of record for plaintiff.

Terrence S. Hartman, Washington, D.C., with whom was *Assistant Attorney General Stuart M. Gerson*, for defendant.

OPINION

YOCK, *Judge*.

This case, involving a challenge to the Bonneville Power Administration's extraregional sales of surplus power (electricity) outside of the Pacific Northwest states, is currently before the Court on the Government's motion to dismiss for lack of subject matter jurisdiction. After oral argument, and for the reasons discussed herein, the Government's motion is granted, but in lieu of dismissal, the complaint is to be transferred to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1631 (1988).

Factual Background

The plaintiff, Puget Sound Power and Light Company (Puget) is an investor-owned utility company that provides electric service to retail customers located within the state of Washington. Its principal place of business is Bellevue, Washington. The Bonneville Power Administration (BPA) is an agency of the United States, established within the Department of Energy. 16 U.S.C. §§ 832 *et seq.* (1988)[1] and 42 U.S.C. §§ 7107 *et seq.* BPA is a marketing agency that sells (generally wholesale) electrical power generated at federal dam sites located throughout the Pacific Northwest states of Washington, Oregon, Idaho, and that part of Montana lying west of the Continental Divide. 16 U.S.C. §§ 832, 838g, 839e(a)(1). Pursuant to statute, BPA is authorized to negotiate and enter into long-term contracts for the supply of electrical power, which are "[s]ubject to * * * such rate schedules as the Secretary of Energy may approve" and which "contain * * * such provisions as the [BPA] administrator and purchaser agree upon for the equitable adjustment of rates at appropriate intervals, not less frequently than once in every five years." 16 U.S.C. § 832d(a). Between 1976 and 1988, Puget entered into such contracts for the wholesale purchase of federal electrical power.

In order to fully understand the decision in this case, it is important to have a general comprehension of the statutory and regulatory framework in which this case arises.

As work progressed in the 1930's upon the "Bonneville Project" being constructed by the U.S. Army Corps of Engineers along the main stem of the Columbia River, the method and priority for distributing electrical power generated by that project became the subject of intense

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[1] Unless stated otherwise, all references to the statutes at issue will be 1988.

public debate. Public power advocates sought to have Congress (1) grant preference to publicly-owned utilities in obtaining power from the project and (2) establish a body with powers similar to those of the Tennessee Valley Authority to operate the dams. *E.g.*, S. Rep. No. 689, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 2790, 74th Cong., 1st Sess. (1935). Private power interests, on the other hand, advocated a more limited federal role with project operation and power sales controlled solely by the Corps. Bonneville Power Administration, *Columbia River Power For The People: A History of Policies of the Bonneville Power Administration*, 79-80 (1981) (BPA History).

When Congress acted upon this matter in 1937, it did not adopt the positions advocated by the public or the private power interests, but instead enacted a compromise. Bonneville Project Act of 1937, 50 Stat. 731, 16 U.S.C. §§ 832-832d. Congress specified that the first priority for the purchase of electricity from the Bonneville Project was to be given to "public bodies and cooperatives," *i.e.*, "[s]tates, public power districts, counties, and municipalities," 16 U.S.C. §§ 832, 837, and that a new agency, the BPA, be created to market electric power generated from the operation of the Bonneville Project throughout the states of Washington, Oregon, Idaho, and that part of Montana lying west of the Continental Divide. Congress, however, allowed the Corps to retain sole responsibility for the daily operation of the dams and construction of additional hydroelectric projects in the Pacific Northwest. 16 U.S.C. § 832a(a); *see generally*, BPA History, at 55-62.

Because of the Corp's massive development of federal dams in the Pacific Northwest during the 1930's and 1940's, BPA had an abundance of low cost federal hydropower for many years. H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. II at 27 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 6023, 6025. This allowed BPA to not only satisfy the needs of its preference customers,

i.e., government agencies and publicly-owned utilities, but to enter into contracts for the sale of power to investor-owned utilities (IOU's) and to privately-owned, electro-process industries, such as aluminum companies, which utilize large quantities of electrical power. *Id.* Thereafter, the electro-process industries that received power from BPA became known as direct service industrial customers (DSI's) because they purchased large quantities of wholesale electrical power directly from BPA, rather than purchasing retail power from an IOU. *See Aluminum Co. of America v. Central Lincoln Peoples' Util. District*, 467 U.S. 380, 384 (1984) (hereinafter *ALCOA v. Central Lincoln PUD*).

Initially, BPA entered into contracts with DSI's and IOU's for the sale of firm power.[2] *Id.* In 1948, however, the increasing demand for power in the Northwest caused BPA to modify its industrial sales policy to require that, whenever feasible, a new contract signed with a DSI would provide that some portion of the power sought would only be supplied as nonfirm energy.[3] *Id.*

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[2] Firm power is an uninterrupted supply of energy, which is available on demand and subject only to contractual limitation. *See ALCOA v. Central Lincoln PUD*, 467 U.S. at 384; Mellem, *Darkness to Dawn? Generating And Conserving Electricity In The Pacific Northwest: A Primer On The Northwest Power Act*, 58 WASH. L. REV. 245, 251 n.47 (1983).

BPA measures its ability to produce firm power, *i.e.*, an uninterrupted supply of energy, based upon the assumption that its hydroelectric generators will produce no more energy than they did during the worst actual water flow conditions in the Columbia River watershed, *i.e.*, the 42½ month period between August 16, 1928 and February 1932. Since hydroelectric power is generated at Columbia River dams when gravity pulls the runoff from annual rains and melting mountain snows through generators on the river's downstream path toward the Pacific Ocean, thereby turning the generators, this period of worst actual water flow is referred to as the "critical period." Mellem, *id.*, at 270.

[3] Nonfirm energy is energy in excess of that which BPA can reliably plan on producing based upon the historical critical period. *Central Lincoln PUD v. Johnson*, 735 F.2d 1101, 1112 (9th Cir.

By the late 1960's, BPA and virtually all of its customers believed that the abundance of cheap federal hydropower in the Pacific Northwest was coming to an end, because there were no economically and environmentally acceptable sites for the construction of additional large-scale, federal hydroelectric projects in the region. Additional hydroelectric projects were essential, since projected increases in electrical consumption for the region indicated that current generating capacity would soon be exhausted. H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. II at 28 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 6023, 6025-26. BPA, therefore, announced in 1973 that its power sales to IOU's would cease later that year, with the expiration of the IOU's 20-year contracts, since BPA believed it would need power previously sold to the IOU's to serve its preference customers' growing needs. *Id.* at 29, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6027; H.R. Rep. No. 976, 96th Cong., 2d Sess. pt. I at 24 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 5989, 5990. Further, BPA announced in 1976 that, for the same reason, it was unlikely that it would be able to renew its power sales contracts with the DSI's when they expired during the period 1981 through 1991. *Id.*; *ALCOA v. Central Lincoln PUD*, 467 U.S. at 385.

1984). Nonfirm energy, therefore, is available only upon an intermittent basis. *See id.*; *ALCOA v. Central Lincoln PUD*, 467 U.S. at 384-85.

Electric utility companies, whether owned by investors or the public, must be ready to meet demand for electric service continuously. *Id.* at 385; *West Texas Util. Co. v. Texas Elec. Serv. Co.*, 470 F. Supp. 798, 807 (N.D. Tex. 1979). Energy which is available only intermittently, therefore, is not of as great a value to a utility as firm energy. *ALCOA v. Central Lincoln PUD*, 467 U.S. at 387-88.

However, DSI's, that are principally manufacturers of aluminum, are unique among BPA's customers. *Id.* at 385. They readily accept nonfirm energy since their industrial processes can withstand periodic power interruptions. *Id.*

When BPA ceased providing inexpensive federal power to the IOU's in 1973, the rates charged by the IOU's to residential customers increased by as much as 300 percent. H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. II at 29, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6023, 6027. As a result, governments representing areas served by the IOU's attempted to obtain BPA's less expensive power for their constituents by creating public entities, which they claimed were entitled to preference from BPA, or by employing other methods. *E.g.*, H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. II at 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6023, 6028; *ALCOA v. Central Lincoln PUD*, 467 U.S. at 385. Moreover, 10 of the 15 DSI's served by BPA claimed that, if they were deprived of direct service from BPA when their contracts expired, they were entitled to similar service from the preference utility which served their locality. H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. I at 25, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5989, 5991.

In 1980, in order to avoid years of litigation and what the Governor of Washington described as a "regional civil war" over low-cost power, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (hereinafter the Northwest Power Act). *Commonwealth Aluminum Corp. v. United States*, 19 Cl. Ct. 300, 302 (1990); H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. II at 27, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5989, 5992-93. This Act granted BPA authority to acquire additional power resources, 16 U.S.C. § 839d, and to initiate measures designed to conserve electricity in the Pacific Northwest. 16 U.S.C. §§ 839b, 839d, and 839f(j); *Central Lincoln PUD v. Johnson*, 735 F.2d 1101, 1107 (9th Cir. 1984).

To avoid disputes over the allocation of power, the Act specified that, within nine months of its effective date, BPA was to enter into an initial set of contracts with each customer previously served. 16 U.S.C. §§ 839c(b),

(d), and (g); *ALCOA v. Central Lincoln PUD*, 467 U.S. at 386; *Commonwealth Aluminum*, 19 Cl. Ct. at 302. For example, section 5 of the Act provided that, "the Administrator shall offer * * * to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.'" 16 U.S.C. § 839c(d)(1)(B); *see* 16 U.S.C. § 839c(g)(1).

Other provisions of the Act address virtually every one of BPA's responsibilities as a federal power marketing agency. The Act specifies principles governing not only the sale of power, but the establishment of rates, administration of regional preferences for extraregional power sales, and methods for obtaining administrative and judicial review of BPA's actions. 16 U.S.C. §§ 839c, 839e, 839(c), 839f(e).

Section 5 of the Northwest Power Act, 16 U.S.C. § 839c, governs sales of power to BPA's customers both inside and outside of the Pacific Northwest. Section 5(b)(1) of the Act authorizes BPA to offer to sell power to Pacific Northwest publicly-owned and investor-owned utilities to meet their firm power needs to the extent such needs exceed their own resources used to serve their regional firm power loads. 16 U.S.C. § 839c(b)(1). Section 5(f) of the Northwest Power Act, 16 U.S.C. § 839c(f), further authorizes BPA to sell "surplus power" to BPA's customers both inside and outside the Pacific Northwest. Section 5(f) provides that:

> The Administrator is authorized to sell, or otherwise dispose of, electric power, including power acquired pursuant to this and other Acts, that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this section in accordance with this and other Acts applicable to the Administrator, including the Bonneville Projects Act of 1937

> (16 U.S.C. 832 and following), the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), and the Act of August 31, 1964 * * *.

Section 7 of the Northwest Power Act, 16 U.S.C. § 839e, governs the establishment of BPA's rates for the sale of electric power and for the transmission of non-federal power over the federal transmission system. Section 7(a)(1) of the Act requires that BPA periodically review and revise its rates in order to recover BPA's costs. 16 U.S.C. § 839e(a)(1). It provides that:

> The Administrator shall establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this chapter and other provisions of law.

Id.[4] Section 7(i) of the Act further requires that BPA establish its rates based upon formal evidentiary hearings before a hearing officer. 16 U.S.C. § 839e(i). Section 7(i) provides that, when establishing rates, BPA's Administrator must (1) publish notice of the proposed rates in the Federal Register with a statement of justification supporting such rates, (2) have a hearing officer hold one or more hearings to develop a full and complete record including public comments related to the proposed rates,

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[4] Similar obligations are imposed upon BPA by section 6 of the Bonneville Project Act, 16 U.S.C. § 832e, and section 9 of the Federal Columbia River Transmission Act, 16 U.S.C. § 838g.

(3) allow submission of written comments upon the proposed rates, (4) furnish an adequate opportunity for persons to offer rebuttal of material submitted by any person, (5) allow for cross-examination, and (6) issue a final decision after conducting the hearing and submission of comments which establishes rates based upon the record developed. 16 U.S.C. §§ 839e(i)(1)-(5).

Also, section 7 of the Act requires that the Federal Energy Regulatory Commission (FERC) review BPA's rates. Section 7(a)(2) specifies that FERC must ascertain whether BPA's rate revenues are sufficient to meet BPA's total system costs and assure repayment of the federal investment in the Federal Columbia River Power System.[5] 16 U.S.C. § 839e(a)(2). Section 7(k) further specifies that BPA's rates for sales of nonfirm energy outside the Pacific Northwest may be subject to an additional hearing before FERC, 16 U.S.C. § 839e(k), and that FERC must review BPA's nonfirm energy rates for compliance with the rate-making standards of the Bonneville Project Act, the Flood Control Act of 1944, and the Federal Columbia River Transmission System Act. *Id.* Section 7(i)(6) expressly provides that BPA's rates only become effective upon interim or final approval by FERC. 16 U.S.C. §§ 839e(a)(2), (i)(6); *Commonwealth Aluminum*, 19 Cl. Ct. at 302.

Section 9(c) of the Northwest Power Act addresses-regional preference. 16 U.S.C. § 839f(c). It provides that the conditions of sections 2 and 3 of the Regional Pref-

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[5] As other federal dams and transmission lines were built on the Columbia, the combined generation and transmission facilities became known as the Federal Columbia River Power System. Today, BPA markets power from some 30 federal hydroelectric projects. BPA also markets electric power generated at two nuclear plants in the Pacific Northwest—100 percent of the power from the Washington Public Power Supply System Plant No. 2, and 30 percent of the power from the Trojan Nuclear Project. BPA's hydroelectric and nuclear capacity have now been integrated into a single power supply system.

erence Act, 16 U.S.C. § 837-837h, apply to all BPA sales of surplus energy and peaking capacity outside the Pacific Northwest. *Id.*; 16 U.S.C. §§ 837a, 837b. It also provides that BPA can sell outside the Pacific Northwest only surplus energy and surplus peaking capacity. 16 U.S.C. § 839f(c); *see also* 16 U.S.C. § 839c(f).

Section 9(c) establishes definitions for the terms governing regional preference. In conjunction with 16 U.S.C. § 839a(14), it defines the term "Pacific Northwest" as a specific geographical area. *See* 16 U.S.C. § 839f(c). It defines the term "surplus energy" as "electric energy for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy." *Id.* It defines the term "surplus peaking capacity" as "electric peaking capacity for which there is no demand in the Pacific Northwest at the rate established for the disposition of such capacity." *Id.*

Section 9(e) of the Northwest Power Act governs judicial review of final actions under the Northwest Power Act and the Regional Preference Act. Section 9(e)(1) expressly provides a list of final actions subject to judicial review under the provisions of the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706. Section 9(e)(1) reads in pertinent part:

> (e) Judicial review; suits
>
> (1) For purposes of sections 701 through 706 of Title 5, the following actions shall be final actions subject to judicial review—
>
> * * * *
>
> (B) sales, exchanges, and purchases of electric power under section 839c of this title;
>
> * * * *
>
> (G) final rate determinations under section 839e of this title; and
>
> * * * *

16 U.S.C. § 839f(e)(1). This list of actions, however, is not exhaustive and does not preclude judicial review of other actions by BPA. 16 U.S.C. § 839f(e)(3). Section 9(e)(5) of the Act further expressly provides that suits challenging any final action under the Act, including those brought pursuant to the Regional Preference Act, are subject to the exclusive jurisdiction of the United States Court of Appeals for the Ninth Circuit. Section 9(e)(5) of the Act reads in pertinent part:

> (5) Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U.S.C. 832 et seq.], the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), *shall* be filed in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred. In the case of a challenge of the plan or programs or amendments thereto, such suit shall be filed within sixty days after publication of a notice of such final action in the Federal Register. Such court shall have jurisdiction to hear and determine any suit brought as provided in this section. The plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this chapter or any other law. Suits challenging any other actions under this chapter shall be filed in the appropriate court.

16 U.S.C. § 839f(e)(5) (emphasis added).

After President Carter signed the Northwest Power Act in December of 1980, BPA promptly began the statutorily-mandated administrative process necessary to develop generic power sales contracts for all classes of its customers. BPA published a notice in the Federal Register outlining the public involvement process for development of the contracts; held public meetings to receive comments upon contract issue; announced in the Federal Register the availability of draft prototype power sales contracts and the period for comment upon those drafts; scheduled public meetings to receive comments from individuals throughout the Pacific Northwest; and conducted negotiations with interested parties. 46 Fed. Reg. 18,331 (Mar. 24, 1981), 23,287 (Apr. 24, 1981), 31,238 (June 12, 1981). Following these negotiations, receipt of comments, and public meetings, BPA offered generic power sales contracts to each class of its customers on August 28, 1981.[6] 46 Fed. Reg. 44,340 (Sept. 3, 1981); *see ALCOA v. Central Lincoln PUD*, 467 U.S. at 387; *Commonwealth Aluminum*, 19 Cl. Ct. at 302. Numerous BPA utility customers, including Puget and various DSI's, executed power sales contracts offered pursuant to this provision. *Pub. Power Council v. Johnson*, 589 F. Supp. 198, 200 (D. Or. 1984).

Between 1976 and 1988, Puget entered into contracts with BPA for the purchase of federal electrical power for resale to its customers. Each of Puget's BPA contracts included generic provisions called General Exchange Provisions or General Contract Provisions, which contained the following provisions or virtually identical provisions:

> (a) The provisions of sections 9(c) and (d) of Public Law 96-501 and the provisions of Public Law

[6] The Administrator's actions in developing the DSI generic contracts subsequently were challenged by BPA's preference customers. The Supreme Court of the United States, however, upheld the Administrator's actions in *ALCOA v. Central Lincoln PUD*, 467 U.S. at 380-406.

88-552 as amended by section 8(e) of Public Law 96-501 ("the Provisions") are by this reference incorporated herein.[7]

(b) To further the policy of the Provisions, Bonneville agrees that the Utility, together with other utilities in the Pacific Northwest, shall have priority on electric power and energy Bonneville has available for sale, in conformity with the Provisions.

(c) Bonneville agrees that it will comply with all restrictions and requirements of the Provisions, and will perform all duties and obligations imposed on it by the Provisions, as the Provisions existed on the effective date of this agreement, regardless of any subsequent modification, amendment or repeal of the Provisions.

(d) Bonneville further agrees that, to the extent and at such times as may be necessary to meet demands for energy or peaking capacity at any established rate for use within the Pacific Northwest, it will exercise its rights, under contractual provisions required by the Provisions to be included in contracts for the disposition of surplus energy or surplus peaking capacity for use outside of the Pacific Northwest, to require:

(1) the return of energy delivered in connection with its supplying peaking capacity for use outside the Pacific Northwest; and

(2) the delivery within the Pacific Northwest of energy, peaking capacity, or both, which Bonneville has the right to receive in any exchange for energy, capacity, or both, which it has delivered for use outside the Pacific Northwest.

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[7] Pub. L. No. 96-501 is known as the Northwest Power Act, 16 U.S.C. § 839f(c), and Pub. L. No. 88-552 is known as the Regional Preference Act, 16 U.S.C. §§ 837-837h.

Puget's contract with BPA, No. 14-03-37050, executed prior to the Northwest Power Act, contains General Exchange Provisions (GEP's) which incorporate the Regional Preference Act, 16 U.S.C. § 837-837h, by reference. Puget's contracts with BPA executed after the Northwest Power Act contain GEP's or General Contract Provisions (GCP's) which incorporate the Regional Preference Act, 16 U.S.C. § 837-837h, and sections 9(c) and 9(d) of the Northwest Power Act, 16 U.S.C. § 839f(c) and (d), by reference.

During the past 10 years, BPA has marketed surplus power inside and outside the Pacific Northwest pursuant to section 5 of the Northwest Power Act, 16 U.S.C. § 839c, at rates established pursuant to section 7 of the Act, 16 U.S.C. § 839e. Puget has consistently opposed such extraregional sales by submitting letters in opposition to BPA, claiming that BPA is marketing power outside the region (mainly to California) in a manner inconsistent with the Regional Preference Act and the Northwest Power Act.

On February 23, 1990, BPA published a notice in the Federal Register announcing the initiation of a public notice administrative process to develop a formal policy governing BPA's sales of surplus power outside the Pacific Northwest region. 55 Fed. Reg. 6420 (Feb. 23, 1990). In this notice, BPA identified three broad categories of issues it wished to address in the policy development. *Id.* BPA also solicited comments from the public regarding the scope of these issues and whether other issues should be identified and included in the policy development. *Id.*

The notice identified the following issues to be addressed:

> 1. Should the definition of "energy requirements of any Pacific Northwest customer" and "electric power requirements of any Pacific Northwest cus-

tomer" as used in the Northwest Preference Act and the Northwest Power Act be further defined? What definition should BPA use in determining the future energy or power requirements of PNW customers? What types of loads should be included and should any type of load be excluded?

2. Should BPA further define the terms "the lack of a market therefor at any established rate" and "for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy" as used in section 1(c) of the Northwest Preference Act and section 9(c) of the Northwest Power Act, respectively? Does BPA's price flexibility have an effect upon BPA's determination of whether there is a market for electric energy or capacity in the PNW? Does BPA's price flexibility affect BPA's determination of the energy requirements or the electric power requirements of any Pacific Northwest customer?

3. What standard should BPA adopt for federal system reliability of service to PNW loads and availability of federal power for use in the PNW? Should this standard of reliability include the purchase of power or acquisition of resources to support the standard?

Id. The Federal Register Notice also identified BPA's reasons for commencing the policy development as follows:

> In most years BPA has significant quantities of surplus nonfirm energy available. Also in periods where BPA firm energy resources exceed firm energy loads, surplus firm energy is available. * * *
>
> The timing, amounts, and other conditions under which BPA markets this surplus energy constitute specific marketing practices interpreting applicable statutory provisions in particular conditions and cir-

> cumstances. Since a number of BPA customers are affected by these marketing practices, it is appropriate for BPA to periodically review them if conditions and circumstances change. The gradual decline in the amount of surplus firm power available in the Pacific Northwest and available to BPA in the past year constitutes such a change. BPA proposes to conduct a review of its practices and develop a policy on key issues affecting sales of surplus firm power and nonfirm energy.

Id. BPA added in the notice that:

> The priority of Northwest utilities to purchase surplus firm power and nonfirm energy prior to BPA selling to out of region utilities has been a concern of BPA's customers. BPA has received comments regarding its past and planned sales of surplus firm power and nonfirm energy from its customers, including statutory and contractual administration of BPA's sales * * *. In particular, questions have been raised regarding when and how BPA should make sales to Pacific Northwest customers before sales out of region and BPA's responsibility to insure that adequate power is available in the Pacific Northwest. BPA's standards for reliability of energy service to its Pacific Northwest customers, once nonregional sales of surplus firm power and nonfirm energy were made, have also been a concern. BPA has addressed some of these questions individually as they arose in a particular sale, and now will review our practice.

Id.

BPA's notice asked for written comments on the scope of its issues to be returned by April 30, 1990. *Id.* After publication of the notice, however, BPA received requests from customers to hold an informational briefing and to extend the time for written comments some 60 additional days. For these reasons, BPA extended the initial com-

ment deadline to July 30, 1990. 55 Fed. Reg. 17,485 (Apr. 25, 1990). This administrative process within the BPA is still ongoing.

On March 1, 1990, approximately one week after the BPA had initiated its formal notice administrative proceeding designed to evaluate its current extraregional sales of surplus electricity policy, Puget filed suit in this Court seeking damages for breach of contract and for declaratory relief in the future. In its complaint, Puget alleges that BPA breached a number of Puget's contracts because BPA's actions in marketing power outside the Pacific Northwest region were inconsistent with the Northwest Power Act, 16 U.S.C. § 839f(c) and the Regional Preference Act, 16 U.S.C. § 837-837h, which are the public laws the clause incorporates into Puget's contracts by reference. Puget contends that:

> Commencing in 1982 and continuing through the date of this Complaint, BPA has been marketing electric power outside of the Pacific Northwest in flagrant disregard and breach of the Regional Preference Provisions contained in Puget Power's BPA Contracts as set forth above and thereby has deprived Puget Power of the preference and priority to BPA electric power which it is guaranteed under such contractual Regional Preference Provisions.

Compl. ¶ 9. Puget further contends that BPA has breached Puget's contacts in the following manner:

> (a) Failure to guarantee to its Pacific Northwest customers, including Puget Power, first call on its electric power;
>
> (b) Disposition of electric power outside of the Pacific Northwest which was not surplus to the needs of the Pacific Northwest or to the needs of Puget Power as a BPA Pacific Northwest customer;
>
> (c) Disposition of electric power outside of the Pacific Northwest for which there was both a market

and a demand in the Pacific Northwest, including a market and demand for such power on Puget Power's electric system as a BPA Pacific Northwest customer;

(d) Refusal to allow Puget Power to purchase or otherwise obtain at established rates BPA electric power which BPA was marketing outside of the Pacific Northwest to others.

(e) Conditioning Puget Power's acquisition of BPA's electric power on payment of the prices for such power which BPA was able to obtain by marketing it outside of the Pacific Northwest; and

(f) Marketing BPA's electric power outside of the Pacific Northwest to others before marketing it first in accordance with the Regional Preference Provisions within the Pacific Northwest to its Pacific Northwest customers, including Puget Power.

Compl. ¶ 10. Therefore, according to Puget, this Court should award it money damages for past breaches of its contracts and award declaratory relief such "that BPA may not in the future sell or exchange power in violation of the Regional Preference Provisions of its contracts with Puget Power * * *." Compl. Prayer for Relief.

Thus, Puget, in its complaint, requests relief: (1) in the amount of 20 million dollars or such other amount as may be proven at trial; (2) for such further damages accruing hereafter until trial; (3) for interest, costs, disbursements and attorneys' fees; (4) declaring that BPA may not in the future sell or exchange power in violation of the Regional Preference Provisions of its contracts with Puget Power; and (5) ordering such other relief as the Court may deem just and proper.

Discussion

This case is currently before the Court on the Government's motion to dismiss for lack of subject matter

jurisdiction. In its motion, the Government contends that despite Puget's characterization of its claim as one for breach of contract, it is in reality a claim challenging the sale of surplus energy by the BPA outside of the Pacific Northwest as being inconsistent and in violation of the preference provisions of two statutes, the Northwest Power Act, 16 U.S.C. § 839-839h and the Regional Preference Act, 16 U.S.C. § 837-837h. The Government asserts that such a claim implicates the exclusive judicial review provisions of the Northwest Power Act, 16 U.S.C. § 839-839h. That Act expressly provides that "sales, exchanges, and purchases of electric power [by the BPA] under section 839c [of the Act]" constitute final actions subject to judicial review and that such review *shall* be filed in the United States Court of Appeals for the region (*i.e.*, Ninth Circuit). 16 U.S.C. § 839f(e)(1) and (5). The Government, therefore, concludes that this precisely drawn and detailed statute expressly provides an exclusive forum for claims challenging final actions taken by BPA's Administrator pursuant to the Act, or BPA's implementation of such final actions. The statute, therefore, preempts any remedy available to a claimant under a general statutory provision, such as the Tucker Act, 28 U.S.C. § 1491, which is the only basis cited by Puget for this Court to entertain its claims.

In addition to its "exclusive jurisdiction" argument, the Government also believes that the doctrine of primary jurisdiction requires that this Court dismiss the plaintiff's for lack of jurisdiction. The Government contends that the BPA had begun administrative proceedings to develop a formal policy governing BPA's extraregional sales of surplus power, prior to the plaintiff's initiation of this suit. The Government asserts that this continuing proceeding will address the same legal issues raised in the plaintiff's complaint. As such, the Government argues that this Court (or any appropriate court) should allow BPA to complete its administrative proceeding prior to judicial review of Puget's claims. Accordingly, the Gov-

ernment concludes that the plaintiff's complaint should be dismissed for lack of jurisdiction under the doctrine of primary jurisdiction.

Finally the Government contends, in the alternative, that Puget's claims for declaratory relief and money damages arising from purported contract breaches occurring more than six years before the filing of the complaint should be dismissed for lack of jurisdiction in any event. This is true, the Government asserts, since this Court clearly does not have authority to issue general declaratory relief orders or to entertain contract claims filed after the expiration of the Court's six-year statute of limitations.[8]

As earlier indicated, the Government prevails on its motion. Because the Court agrees with the Government's "exclusive jurisdiction" argument placing exclusive final action review jurisdiction of the plaintiff's claim in the United States Court of Appeals for the Ninth Circuit, the Court need not determine whether the doctrine of primary jurisdiction would also preclude this Court from asuming jurisdiction in this matter.[9]

Like its predecessor, the United States Court of Claims, this is a court of special and therefore limited jurisdiction. *American Maritime Transport, Inc. v. United States*, 870 F.2d 1559, 1563 (Fed. Cir. 1989). *Kennedy v. United States*, 19 Cl. Ct. 69, 75 (1989); *Heagy v. United States*, 12 Cl. Ct. 694, 697 (1987), *aff'd mem.*, 848 F.2d 1244 (Fed. Cir. 1988); *Dynalectron Corp. v. United*

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[8] At oral argument, the plaintiff conceded that only those contract breaches that occurred within the six years prior to the filing of its law suit would still be viable. *See* 28 U.S.C. § 2401.

[9] Although unnecessary to decide, the Government is also correct that this Court does not have general declaratory judgment jurisdiction in the contract subject matter area. *See United States v. Kina*, 395 U.S. 1 (1969); *Overall Roofing & Constr., Inc. v. United States*, No. 90-5113 (Fed. Cir. Mar. 29, 1991); *see also* 28 U.S.C. § 1491(a)(3) and legislative history.

States, 4 Cl. Ct. 424, 428 (1984), *aff'd mem.*, 758 F.2d 665 (Fed. Cir. 1984); *see also Soriano v. United States*, 352 U.S. 270, 273 (1957). This is not an unusual concept, since even the district and circuit courts of the United States have jurisdiction only over those matters that the Congress has chosen to entrust by legislation to their welfare. Also, absent congressional consent to entertain a claim against the United States, the Court lacks authority to grant relief. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

Congressional consent to suit in this Court, thereby waiving the Government's traditional immunity, must be explicit and strictly construed. *Library of Congress v. Shaw*, 478 U.S. 310, 318-19 (1986); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983). A waiver of sovereign immunity, therefore, cannot be implied, but must be expressed unequivocally by Congress. *United States v. Testan*, 424 U.S. at 399; *United States v. King*, 395 U.S. 1, 4 (1969).

The central provision granting consent to suit in this Court is the Tucker Act, 28 U.S.C. § 1491. *United States v. Testan*, 424 U.S. at 397; *Aetna Casualty & Surety Co. v. United States*, 228 Ct. Cl. 146, 151, 655 F.2d 1047, 1051 (1981). Under that statute, an action may be maintained in this Court only if it is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491.

In this case, Puget alleges that:

> Commencing in 1982 and continuing through the date of this Complaint, BPA has been marketing

> electric power outside of the Pacific Northwest in flagrant disregard and breach of the Regional Preference Provisions contained in Puget Power's BPA Contracts as set forth above and thereby has deprived Puget Power of the preference and priority to BPA electric power which it is guaranteed under such contractual Regional Preference Provisions.

Compl. ¶ 9. Puget, thereafter, contends that this Court has jurisdiction to hear its claims because they are founded upon a breach of an express contract with the United States. Puget, however, fails to recognize that, even if one assumes that the claims asserted in its complaint are founded upon a contract with the United States, and thus nominally within the jurisdiction of this Court pursuant to the Tucker Act, this Court lacks jurisdiction to entertain those claims because Congress has expressly placed jurisdiction over those claims in another forum under the Northwest Power Act.

In a variety of contexts, the United States Supreme Court has held that a remedy furnished by a precisely drawn and detailed statute preempts a more general remedy provided by statute. *Brown v. GSA*, 425 U.S. 820, 834 (1976); *Stonite Prod. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 566-67 (1942). For example, in *United States v. Demko*, 385 U.S. 149 (1966), the Court expressly held that a prison inmate, who was injured during prison employment and, therefore, eligible for compensation under a statute authorizing Federal Prison Industries to pay compensation to inmates for injuries suffered on the job, 18 U.S.C. § 4126, was precluded from suing for damages under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671. The Court explained that, because the "Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." *United States v. Demko*, 385 U.S. at 151, *quoting Johansen v. United States*, 343 U.S. 427, 441 (1952).

Further, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court expressly held that state prisoners may not seek redress under the Civil Rights Act, 42 U.S.C. § 1983, even though their complaints come within the literal terms of that statute because the federal habeas corpus statute, 28 U.S.C. § 2254 clearly provides a specific federal remedy. The Court stated that, in amending the habeas corpus laws, Congress clearly required exhaustion of state remedies as a condition precedent to invocation of federal judicial relief, and it would wholly frustrate explicit congressional intent to hold that claimants could evade this requirement by the simple expedient of putting a different label on their pleadings. *Preiser* at 489.

The rule that a remedy furnished by a precisely drawn, detailed statute preempts a more general statutory remedy is especially applicable to the general remedy provided by the Tucker Act, because the legal doctrine that consent to suit against the sovereign must be strictly construed overrides the doctrine that repeals by implication are not favored. *E.g., Harris v. United States*, 841 F.2d 1097, 1100-01 (Fed. Cir. 1988); *John Muir Memorial Hosp., Inc. v. United States*, 221 Ct. Cl. 843, 846 (1979). As the United States Court of Appeals for the Federal Circuit recently explained in *Harris*, 841 F.2d at 1100, *citing Testan*, 424 U.S. at 398-99, the Supreme Court has long adhered to the classic jurisdictional doctrine—(a) that the United States, as sovereign, cannot be sued without its own express consent granted by Congress, (b) that such consent "cannot be implied but must be unequivocally expressed," and (c) that there must be not only consent to suit in the tribunal that is to exercise jurisdiction, but also to the substantive liability for which money is sought. Thus, repeal of a preexisting Tucker Act remedy by implication, *i.e.*, a statute providing a more specific remedy, "is highly respectable and not a novelty" because the unequivocal expression for consent to suit against the sovereign means "something more than just expressed." *Harris*, 841 F.2d at 1101.

One need only examine several classic Supreme Court decisions to see that "[t]he instances of partial repeal of the Tucker Act by laws expressly directing litigation of some class or kind elsewhere are common." *Fiorentino v. United States*, 221 Ct. Cl. 545, 555, 607 F.2d 963, 969 (1979), *cert. denied*, 444 U.S. 1083 (1980). For example, over 50 years ago, the Supreme Court held in *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932), that enactment of the Suits in Admiralty Act of 1920, 41 Stat. 525-28, which consented to suits against the United States upon admiralty claims in district courts, withdrew by implication that portion of the Tucker Act which consented to admiralty suits against the United States, even though such suits frequently had been entertained by the Court of Claims. More recently, the Supreme Court held in *Brown* that previously debatable judicial remedies against the United States for racial discrimination in employment, including the Tucker Act, were all repealed by implication when Congress enacted the Equal Employment Act of 1972, 86 Stat. 103. The Court stated that "[t]he legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy" and this "unambiguous congressional perception seems to indicate that the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown*, 425 U.S. at 828-29. The Court added that "[t]he balance, completeness, and structural integrity of the [newly enacted statutory provision] are inconsistent with the petitioner's contention that the judicial remedy afforded by [the new statute] was designed merely to supplement other putative judicial relief." *Brown*, 425 U.S. at 832.

This Court's predecessor, the United States Court of Claims, has repeatedly adhered to the principle enunciated by the Supreme Court—that a statute expressly directing that claims be pursued in another forum implic-

itly repealed any previously available consent to suit under the Tucker Act. For example, in *John Muir Memorial Hosp., Inc.*, 221 Ct. Cl. at 845-46; *Alabama Hosp. Ass'n v. United States*, 228 Ct. Cl. 176, 185, 656 F.2d 606, 611-12 (1981), *cert. denied*, 456 U.S. 943 (1982); *Appalachian Regional Hosp., Inc. v. United States*, 217 Ct. Cl. 1, 7-9, 576 F.2d 858, 861-62 (1978); and *Whitecliff, Inc. v. United States*, 210 Ct. Cl. 53, 58, 536 F.2d 347, 351 (1976), *cert. denied*, 430 U.S. 969 (1977), the Court of Claims expressly held that the Tucker Act confers jurisdiction upon the court to resolve claims for Medicare reimbursement only in the absence of specific legislation providing that review be available exclusively elsewhere. Further, in *Fiorentino*, 221 Ct. Cl. at 555, 607 F.2d at 969-70, the Court of Claims expressly held that "[i]f the consent to be sued here ever included the back pay claim of one having no property interest in his job, and legally aggrieved solely because of derogatory material in government files generated by his firing, we think that consent is withdrawn by the Privacy Act of 1974, 5 U.S.C. § 552a," which "provides an administrative remedy for one so aggrieved, and if he is unsuccessful with that, he can sue in the U.S. District Court, including a suit for correction of his record." In explaining its decision, the court reiterated the principle that "the rule of strict construction of the consent to be sued overrides the rule that repeals by implication are disfavored." *Fiorentino*, 221 Ct. Cl. at 556, 607 F.2d at 969-70.

The United States Court of Appeals for the Federal Circuit recently reaffirmed the validity of *Fiorentino* and other similar precedent. In *Harris*, 841 F.2d at 1100-01, the court of appeals held that the more specific provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, effected a repeal by implication of the provisions of the Tucker Act, so far as the Tucker Act consented to suit for environmental differential pay to a prevailing wage employee without regard to available remedies such as arbitration. The court stated that the

Supreme Court's recent opinion in *United States v. Fausto*, 484 U.S. 439 (1988), "teaches that in effectuating the intent of Congress to replace one remedy with another, the doctrine that repeals by implication are not favored cannot be allowed to overcome other and plainer indications of intent." *Harris*, 841 F.2d at 1100.

Similarly, in *McClary v. United States*, 775 F.2d 280 (Fed. Cir. 1985), the court held that the Civil Service Reform Act of 1978, 5 U.S.C. § 7512, effected a repeal by implication of the provisions of the Tucker Act so far as the Tucker Act consented to suit for a back pay claim based upon an improper demotion. The court explained that, under the Civil Service Reform Act, Congress had expressly provided another means of redress for such claims, *i.e.*, an appeal to the Merit Systems Protection Board. *Id.* at 282; *accord Carter v. Kurzejeski*, 706 F.2d 835, 839-40 (8th Cir. 1983).

Accordingly, even if a claim asserted in a complaint is assumed to be one founded upon a contract or a legal provision, which can be construed fairly as mandating the payment of monies sought, and thus nominally within the jurisdiction of this Court pursuant to the Tucker Act, it is well established that this Court will lack jurisdiction to entertain that claim if Congress has expressly placed jurisdiction over that claim elsewhere. *E.g.*, *Matson Navigation Co.*, 284 U.S. at 356, 359; *Fox v. United States*, 229 Ct. Cl. 478, 479 (1981); *Freese v. United States*, 221 Ct. Cl. 963, 965 (1979); *Fiorentino*, 221 Ct. Cl. at 555, 607 F.2d at 969-70; *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 606, 372 F.2d 1002, 1008 (1967); *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 167 Ct. Cl. 236, 244, 334 F.2d 622, 626 (1964), *cert. denied*, 379 U.S. 964 (1965); *Amerikohl Mining, Inc. v. United States*, 16 Cl. Ct. 623, 624-27 (1989), *aff'd* 899 F.2d 1210 (Fed. Cir. 1990). As the Court of Claims explained in *John Muir Memorial Hosp., Inc.*, 221 Ct. Cl. at 846, where Congress wishes to pre-

serve jurisdiction in this Court when subsequently providing a remedy for claims elsewhere, it is careful to expressly state that this Court's jurisdiction survives, as in 28 U.S.C. § 1346(a) (tax refund claims). A statute directing that a claim be pursued elsewhere, therefore, must be interpreted as withdrawing consent to suit in this Court. *John Muir Memorial Hosp., Inc.* 221 Ct. Cl. at 846; *accord Harris*, 841 F.2d at 1100-01; *McClary*, 775 F.2d at 282; *Skirlick v. United States*, 17 Cl. Ct. 735, 741 (1989), *aff'd mem.*, 904 F.2d 45 (Fed. Cir. 1990).

On March 1, 1990, Puget filed its complaint with this Court alleging that BPA had breached its contracts with Puget by marketing electric power outside the Pacific Northwest in a manner inconsistent with the Regional Preference Act, 16 U.S.C. §§ 837-837h, and section 9(c) of the Northwest Power Act, 16 U.S.C. § 839f(c). Puget rests its claim on generic contract provisions appended to all BPA power sales contracts which incorporate those two Acts by reference. As the defendant has contended, however, the true nature of Puget's claim is a challenge to BPA's extraregional power sales under the Northwest Power Act as not complying with that Act and the Regional Preference Act.

Puget cites a number of its contracts with BPA that incorporate the above-noted Acts by reference. It alleges that BPA has breached its contracts with Puget by marketing electric power outside of the region in a manner inconsistent with the generic contract provisions. However, these contract provisions simply incorporate the statutory provisions of the Regional Preference Act and sections 9(c) and 9(d) of the Northwest Power Act. Accordingly, these sections simply provide that BPA will act in compliance with the terms of the statutes. The issues identified in Puget's complaint, therefore, are solely statutory, premised on statutory language, not contract language. *See generally Honeywell, Inc. v.*

United States, 228 Ct. Cl. 591, 596, 661 F.2d 182, 186 (1981).

While Puget raises a number of claims in its complaint, each of Puget's claims is an alleged statutory violation. *See* 16 U.S.C. §§ 837a, 837b, 837c, 837d; 16 U.S.C. § 839f(c). Under the Northwest Power Act, BPA's extraregional power sales and implementation of those power sales pursuant to section 5(f) of the Act are final actions of the Administration of the BPA that must comply with the requirements of section 9(c) of that Act, 16 U.S.C. § 839f(c), and the Regional Preference Act, 16 U.S.C. §§ 837-837h. If BPA sells power outside the region in a manner consistent with the Acts, the sales are "lawful," *i.e.*, in accordance with the statutes. If BPA sells power outside the region in a manner inconsistent with the Acts, the sales are "not lawful," *i.e.*, a violation of the statutes. Thus, it is clear that the *source* of Puget's claim is the consistency of BPA's power sales outside the region with the "governing statutes."

In passing the Northwest Power Act, Congress expressly directed that the United States Court of Appeals for the Ninth Circuit has exclusive jurisdiction to review the lawfulness of BPA's power sales. Section 9(e)(5) of the Northwest Power Act, 16 U.S.C. § 839f(e)(5), a comprehensive and detailed statute governing virtually all functions performed by BPA, provides that the Ninth Circuit has exclusive jurisdiction to review BPA's actions under the Northwest Power Act and the Regional Preference Act. It states that:

> Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this Act, the Bonneville Project Act [16 U.S.C. § 832 *et seq.*], the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission

> System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region.

16 U.S.C. § 839f(e)(5).

Section 9(e)(1) of the Northwest Power Act, 16 U.S.C. § 839f(e)(1), provides a nonexclusive list of final actions subject to the Ninth Circuit's exclusive jurisdiction, including power sales. Section 9(e)(1) states that:

> For purposes of section 701 through 706 of title 5, the following actions shall be final actions subject to judicial review—
>
> * * * *
>
> (B) sales, exchanges, and purchases of electric power under section 839c * * *.

Here, as discussed above, the action Puget challenges is the *sale* of surplus electric power outside the Pacific Northwest. Sales of surplus power are an action authorized under section 5(f) of the Northwest Power Act, 16 U.S.C. § 839c(f). Section 5(f) provides that:

> The Administrator is authorized to sell, or otherwise dispose of, electric power, including power acquired pursuant to this and other Acts, that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this section in accordance with this and other Acts applicable to the Administrator, including the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), and the Act of August 31, 1964 (16 U.S.C. 837-837h).

In addition, extraregional sales of power are an action of the Administrator under section 9(c) of the Northwest Power Act, 16 U.S.C. § 839f(c).

To the extent Puget is resting its claim upon the Regional Preference Act, Puget's claim also clearly comes

within the Northwest Power Act provisions for judicial review. Section 9(e)(5) of the Northwest Power Act expressly places judicial review of final actions and decisions brought pursuant to the Regional Preference Act within the exclusive jurisdiction of the Ninth Circuit. As noted above, section 9(e)(5) provides that suits to challenge "final actions and decisions taken pursuant to this chapter [see sections 5(f) and 9(c)] by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, * * * [or] the Act of August 31, 1964 (16 U.S.C. 837-837h) [Regional Preference Act] * * * shall be filed in the United States court of appeals for the region [*i.e.*, Ninth Circuit]." 16 U.S.C. § 839f(e)(5). Thus, Congress expressly intended that challenges to agency actions such as surplus power sales under the Regional Preference Act would be within the exclusive jurisdiction of the Ninth Circuit.[10] *Id.*; *see also* 16 U.S.C. § 839c(f).

The central issue of this motion is, therefore, whether the plaintiff's claim for breach of contract, is, in effect, a challenge to a *final action* of the Administrator of the BPA, *i.e.*, the sale of surplus electric power out of the region (or implementation thereof) which removes the claim from the jurisdiction of this Court.

The Ninth Circuit repeatedly has held that its jurisdiction to review BPA's final actions under the Northwest Power Act is exclusive. *Pub. Util. Comm'r v. BPA*, 767 F.2d 622, 627 (9th Cir. 1985); *Pacific Power & Light Co. v. BPA*, 795 F.2d 810, 814 (9th Cir. 1986); *Central Lincoln PUD v. Johnson*, 735 F.2d at 1109; *Central Montana Elec. Power Coop., Inc. v. Adm'r BPA*, 840 F.2d 1472,

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[10] If Congress specifically designates a forum for judicial review of administrative action, that forum is exclusive regardless of whether the statute uses the word "exclusive." *UMC Indus., Inc. v. Seaborg*, 439 F.2d 953, 955 (9th Cir. 1971); *Amerikohl Mining, Inc. v. United States*, 16 Cl. Ct. at 624-27, *aff'd* 899 F.2d 1210 (Fed. Cir. 1990).

1476 (9th Cir. 1988). In addition, the court consistently has held that it is the nature of the conduct challenged which determines the exclusive jurisdiction of the court—where the conduct challenged is a final action taken pursuant to the Northwest Power Act, the Ninth Circuit has exclusive jurisdiction. *Pacific Power & Light Co. v. BPA*, 795 F.2d at 814; *CP Nat'l Corp. v. Jura*, 876 F.2d 745, 747-48 (9th Cir. 1989); *Pub. Util. Dist. No. 1 of Clark County v. Johnson*, 855 F.2d 647, 649 (9th Cir. 1988) (hereinafter *Clark County*).

In the instant case, the conduct challenged is the sale of BPA's surplus power outside the Pacific Northwest pursuant to section 5(f) of the Northwest Power Act. 16 U.S.C. § 839c(f); Compl. ¶ 9. BPA's power sales, including sales of surplus power, are final actions subject to the Ninth Circuit's exclusive jurisdiction. 16 U.S.C. §§ 839f (e)(1)(B), (5).

In *Pacific Power & Light Co. v. BPA*, 589 F. Supp. 539 (D. Or. 1984), plaintiffs brought suit in the federal district court for declaratory relief from BPA's adoption of a new average cost methodology as a breach of its contractual obligation to the plaintiffs, based upon the Northwest Power Act. The district court judge dismissed the case for lack of subject matter jurisdiction, concluding that "[a]lthough plaintiff's seek to characterize their remaining claim as a pure contract issue unentangled with the merits or procedure of BPA's rate proceeding, my exercise of jurisdiction would necessarily impact the course of the * * * rate case." *Id.* at 545.

On appeal, the Ninth Circuit affirmed the district court. *Pacific Power & Light Co. v. BPA*, 795 F.2d 810 (9th Cir. 1986). The appeals court based its decision pertaining to its jurisdiction not upon the legal theory advanced by plaintiff but rather the agency function:

> In § 839f(e)(5), [the judicial review provision for the sale of electric power] Congress has decided that

> jurisdiction under the Act should be a function of the agency whose actions are being challenged rather that an function of the cause of action which petitioner asserts. This jurisdictional scheme is consistent with myriad statutes which confer original jurisdiction on courts of appeals based upon the agency being attacked. *See e.g.*, 28 U.S.C. § 2321 (actions by the Interstate Commerce Commission); 28 U.S.C. § 2342 (actions by several independent federal commissions); 29 U.S.C. § 160 (orders of the National Labor Relations Board); 15 U.S.C. § 717r (Federal Energy Regulatory Commission orders under the Natural Gas Act) * * *. For jurisdictional purposes, therefore, it matters not whether the utilities' suit is grounded in contract, administrative law, or some other legal theory. Instead, jurisdiction arises because the actions of a particular agency are being challenged and because of the nature of the agency action at issue. The proper inquiry focuses on the agency being attacked and whether the factual basis for that attack is an agency action authorized by the Act.

Id. at 816.

In *Central Montana Elec. Power Coop., Inc. v. Adm'r BPA*, 840 F.2d 1472 (9th Cir. 1988), public utility customers of BPA in Montana asserted that they were entitled to a geographic preference in power generated by the Libby hydroelectric project. The customers alleged that power generated at Libby was to be marketed first in Montana. In determining jurisdiction, the court stated that:

> The nature of the agency action being challenged by the Cooperatives is the Administrator's final action as to the marketing an allocation of electric power, a function that is governed extensively by the Northwest Power Planning Act. The Cooperatives maintain that they do not challenge a final determination "under" the Northwest Power Planning act.

> However, the effect of their action is to challenge the BPA's power-marketing decision * * *. Accordingly, the action is subject to our exclusive jurisdiction under 16 U.S.C. § 839f(e)(5).

Central Montana, 840 F.2d at 1476. The court held that "[b]ecause we find that the Administrator's power allocation decision was a 'final action and decision taken pursuant to [the Northwest Power Planning] Act,' 16 U.S.C. § 839f(e)(5), original jurisdiction over the Cooperatives' challenge to the Administrator's decision lies exclusively with this Court." *Central Montana*, 840 F.2d at 1476.

In the instant case, Puget is also challenging the Administrator's "marketing and allocation of electric power" and claiming a geographic preference right to power. Puget's challenge to the Administrator's power marketing decision is founded expressly upon the Northwest Power Act and the Regional Preference Act. Puget's claim, therefore, is subject to the exclusive jurisdiction of the Ninth Circuit under 16 U.S.C. § 839f(e)(5).

This principle has been repeatedly followed. In *CP Nat'l Corp. v. Jura*, 876 F.2d 745, 747 (9th Cir. 1989), the court held that:

> A party's characterization of its claim as one for breach of contract is not dispositive of jurisdictional issues. In *Pacific Power and Light Co. v. Bonneville Power Administration*, 795 F.2d 810, 816 (9th Cir. 1986), we stated that in enacting section 839f(e)(5), Congress has decided that jurisdiction under the Act should be a "function of the agency whose actions are being challenged rather than a function of the cause of action which petitioner asserts."

Similarly, in *Central Elec. Coop. v. BPA*, 835 F.2d 199 (9th Cir. 1987), a utility customer of BPA claimed that BPA's refusal to acknowledge a rate increase which would have given the petitioner increased subsidy benefits constituted a breach of contract. The court stated that

"[w]hile CEC urges us to declare that contract law governs this suit, * * *. BPA views its action as a regulatory decision rather than a breach of contract." *Id.* at 203. The court then rejected the breach of contract characterization, finding that the Ninth Circuit has exclusive jurisdiction to review "sales, exchanges, and purchases of electric power" under section 5 of the Northwest Power Act. *Id.* at 204.[11]

An evaluation of congressional intent reveals at least two compelling reasons why Congress decided in the Northwest Power Act to place judicial review of challenges to the sale of BPA power exclusively in the Ninth Circuit. First, Congress desired to avoid conflicting judicial interpretations among federal courts. *Forelaws on Bd. v. Johnson*, 709 F.2d 1310, 1313 (9th Cir. 1983) (the bifurcation of court review could result in the same agency decision being reviewed simultaneously at two different levels); *Pacific Power & Light Co. v. BPA*, 795 F.2d at 815 ("[o]riginal jurisdiction in [the court of appeals] permits uniform interpretation of the Act and promotes expedited review"). *See also Clark County*, 855 F.2d at 650. Although the above cases concern jurisdictional questions between the region's district courts and the court of appeals, the reasoning is equally applicable to the case at bar. If this Court were to decide Puget's claim on the merits, such a decision would necessarily concern agency action authorized under the Act and such questions are expressly reserved for review by the court of appeals. Thus, a decision by this Court would circumvent the congressional intent for uniform interpretation of the Act.

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[11] Ordinarily, of course, district courts and the regional courts of appeals cannot entertain "contract actions" against the United States, except pursuant to the Little Tucker Act, 28 U.S.C. § 1346. *E.g., North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985).

The second compelling reason why the Ninth Circuit is given exclusive judicial review is to ensure a speedy resolution of the issue. The congressional purpose of the Act was to respond to the urgent need to allocate power in the Pacific Northwest. *See Pub. Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982); *Forelaws on Bd. v. Johnson*, 709 F.2d at 1312-13; *Central Montana Elec. Coop., Inc. v. Adm'r BPA*, 840 F.2d at 1476. As the district court noted in *Nat'l Wildlife Fed'n v. Johnson*, 548 F. Supp. 708, 709-10 (D. Or. 1982) *aff'd sub nom. Forelaws on Bd. v. Johnson*, 709 F.2d 1310 (9th Cir. 1983),

> It was the intent of Congress to expedite the litigation they knew would follow passage of and actions under this act. If the suit, in fact, challenges 'final actions' it should be expedited as directed by Congress. [Footnote omitted.]

By eliminating the involvement of one level of the federal judiciary (the trial level) and designating a single tribunal to hear disputes, Congress intended to promote the quick and efficient resolution of conflicts arising under the Act. This is no doubt the reason why the statute reads that any challenges to final actions have to be brought to the Ninth Circuit within 90 days. Were this Court to exercise jurisdiction over the merits, congressional intent would be circumvented in two ways: (1) by allowing a delay of up to six years (under the Tucker Act), and (2) by allowing review by a federal appellate court other than the Ninth Circuit.

While challenges to final actions under the Northwest Power Act, such as power sales, are subject to the Ninth Circuit's exclusive jurisdiction, BPA's *implementation* of those final actions is also subject to the Ninth Circuit's exclusive jurisdiction. The Ninth Circuit has exclusive jurisdiction to review challenges to the *implementation* of final actions under the Northwest Power Act and the Regional Preference Act. 16 U.S.C. § 839f(e)(5).

Here, Puget alleges that BPA's extraregional power sales are unlawful. However, such sales are administrative allocations of power administered through contracts. Thus, in challenging BPA's extraregional power sales, Puget essentially challenges BPA's administrative allocation of federal power and the implementation of the extraregional sales contracts.

Preference, as discussed below, is a right granted by statute to certain entities. It requires that a federal agency give priority to specified entities when it administratively allocates federal power sold under contracts if there is a competing application by preference agencies for unallocated federal power. A statutory right to preference and priority merely determines who has the first opportunity to purchase federal power which is available and not previously allocated by contract. A claim to preference and priority in the sale of federal power thus is an administrative claim over the manner in which the federal agency has interpreted and implemented applicable federal statues granting the purchaser a right to priority in purchasing available federal power.

The Ninth Circuit consistently has addressed regional preference issues. *Pacificorp v. BPA*, 856 F.2d 94 (9th Cir. 1988); *Aluminum Co. of America v. BPA*, 891 F.2d 748, *modified*, 903 F.2d 585 (9th Cir. 1989), *cert. denied sub nom., California Public Utilities Comm'n v. FERC*, 111 S.Ct. 672 (1991); *California Energy Resources Conservation & Dev. Comm'n v. BPA*, 831 F.2d 1467 (9th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988); *California Energy Resources Conservation & Dev. Comm'n v. Johnson*, 783 F.2d 858, *modified*, 807 F.2d 1456 (9th Cir. 1986); *Central Montana Elec. Coop., Inc. v. Adm'r of BPA*, 840 F.2d at 1472; *Dept. of Water & Power v. BPA*, 759 F.2d 684 (9th Cir. 1985). The Ninth Circuit is the court designated by Congress to review such issues. 16 U.S.C. § 839f(e)(5).

The United States Supreme Court has specifically characterized a claim of preference as one involving a statu-

tory right to an administrative allocation of federal power through power sales contracts. In *ALCOA v. Central Lincoln PUD*, 467 U.S. at 393, BPA's preference customers challenged the allocation of nonfirm energy for service to the DSI top quartile loads under the Northwest Power Act contracts on the grounds that previously BPA had sold nonfirm energy to preference customers first. In discussing whether BPA had violated section 5(a) of the Bonneville Project Act, 16 U.S.C. § 832d(a), and section 5(a) of the Northwest Power Act, 16 U.S.C. § 839c(a), by providing nonfirm energy to its DSI customers under new contracts, the Supreme Court addressed the meaning of preference and priority. The Court stated that:

> It is true, as respondents assert, that that section preserves the priority and preference provisions that existed under the Project Act. But the preference system merely determines the priority of different customers when the Administrator receives "conflicting or competing" applications for *power that the Administrator is authorized to allocate administratively.*

ALCOA v. Central Lincoln PUD, 467 U.S. at 393 (emphasis added). The Court held that the contracts did not violate preference principles because there was a congressional allocation of power. The Court further explained that preference continues to be a factor in administrative power allocations:

> As was the case prior to the Regional Act, preference continues to govern *the allocation of all power that is not committed by contract.* Thus, the preference rules will apply to any subsequent contracts made with DSIs. Even during the period of the initial contracts, the *preference provisions apply to any surplus power that exists. See 16 U.S.C. § 839c (f).* Such surplus might exist for example, because of especially high annual or seasonal streamflow fluctuations, or because BPA's power acquisition

> program secures additional power faster than BPA's increasing contractual commitments.

ALOCA v. Central Lincoln PUD, 467 U.S. at 395 n.10 (citation omitted, emphasis added). BPA simply is required to give preference to public bodies' "applications for power when competing applications from nonpreference customers are received." *ALCOA v. Central Lincoln PUD*, 467 U.S. at 384. Thus, preference is a statutory right which governs the administrative allocation of federal power which has not already been committed by contract. The right of preference is essentially a right of first refusal on the power to be sold, but only if a competing request is made.

Courts reviewing preference claims made by other purchasers against other federal power marketing agencies have similarly interpreted preference provisions. In *Arizona Power Auth. v. Morton*, 549 F.2d 1231 (9th Cir.), *cert. denied*, 434 U.S. 835 (1977), the court reviewed claims to preference under section 9 of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), finding that the provision "defines a class of 'preference' customers who shall have the first opportunity to purchase hydroelectric power generated by federal reclamation projects." *Arizona Power*, 549 F.2d at 1237 (emphasis added); *accord Santa Clara v. Andrus*, 572 F.2d 660, 667 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

Moreover, challenges to the allocation of power from federal projects by other federal power marketing agencies have been previously reviewed by courts as administrative claims under the APA, 5 U.S.C. §§ 701-705. In *Arizona Power*, the court stated that the issue was whether the exercise of the Secretary of Interior's authority under the Colorado River Storage Project Act to contract for the sale of federal power was judicially reviewable under the APA.

As discussed above, an analysis of the statutory provisions cited by Puget demonstrates that any right to

preference Puget may have is in no way expanded or diminished under the statutory provisions incorporated into its contracts. Rather, BPA was directed by statute to include the provisions in all its contracts. The Regional Preference Act states in pertinent part that "[t]he Secretary * * * shall include in all new contracts provisions giving the purchaser priority on electric power generated at [federal hydroelectric] plants in conformity with the provisions of this chapter." 16 U.S.C. § 837f. Thus, the contract provisions do nothing more than restate a statutory right as required by Congress.

BPA implements its administrative allocations of federal power by making sales to purchasers under contracts. Puget is not the only purchaser with whom BPA contracts for the sale of power. All BPA sales are made under written contracts with the exception that daily, weekly or other short-term nonfirm power sales are made under umbrella agreements and memoranda for such sales. 16 U.S.C. § 832d(a); 16 U.S.C. §§ 839c(b), (d), (f). The implementation of BPA's administrative allocations through contracts is contemplated by and consistent with the provisions of section 2 of the Regional Preference Act, which requires BPA to give notice to its existing customers that negotiations for a contract for the sale of surplus power are pending and, at the customer's request, to make available current drafts of contracts for inspection. 16 U.S.C. § 837a. BPA's contracts for the sale of surplus power under section 5(f) and its sales of surplus power are final actions of the Administrator of BPA or are implementations of a final action, that is, the Administrator's administrative allocations of federal power to purchasers. *See ALCOA v. Central Lincoln PUD*, 469 U.S. at 393. The precise issue of whether and how BPA must afford Puget and other Pacific Northwest utilities priority in the purchase of federal power, before it contracts with other parties for the sale of surplus power outside the Pacific Northwest, is exclusively an issue of BPA's interpretation and administra-

tion of its statutes governing its administrative allocations of federal power through such sales.

In its opposition to the Government's motion to dismiss, Puget has attempted to circumvent the Northwest Power Act provisions establishing exclusive jurisdiction of the Ninth Circuit to review challenges to BPA's power sales by contending that it is asserting a breach of contract claim, and that the Ninth Circuit has ruled that it lacks jurisdiction to review breach of contract claims for money damages. As support for this contention, Puget relies almost totally upon *Pub. Util. Dist. No. 1 of Clark County v. Johnson*, 855 F.2d 647 (9th Cir. 1988). Puget, however, misreads the *Clark County* case.

Clark County affirms that the Ninth Circuit has exclusive jurisdiction to review challenges to the lawfulness of final actions taken by BPA pursuant to the Northwest Power Act, even where, as here, a plaintiff characterizes its claim as a breach of contract. In that case, petitioner, the Clark County PUD, a publicly-owned utility customer of BPA, filed suit in the Ninth Circuit alleging that the BPA improperly failed to purchase a resource (electricity) from the PUD. The PUD raised a number of claims before the court, including: (1) that BPA breached an oral or implied-in-fact contract; (2) that BPA negligently (*i.e.*, tortiously) failed to perform a duty imposed on it by the Northwest Power Act to execute its oral or implied-in-fact contract with the PUD; and (3) that BPA's decision not to acquire the resource was an arbitrary and capricious agency action violating the mandate of the Northwest Power Act to acquire cost effective resources. *Id.* at 648. The court analyzed its jurisdiction to review these claims, and concluded that the Ninth Circuit had jurisdiction to review any challenges to final agency action but that the Claims Court had exclusive jurisdiction to review the alleged breach of an oral or implied-in-fact contract for money damages exceeding $10,000.

In so concluding, the court distinguished between its exclusive jurisdiction over challenges to final agency action under the Northwest Power Act and the Claims Court's jurisdiction to review breach of contract claims against the United States in excess of $10,000. 855 F.2d at 650. The court explained that one must "determine jurisdiction by looking to the nature of the conduct challenged rather than the label given the cause of action." *Id.* at 649. The relevant issue, therefore, is whether the claimant's action is based upon a final action under the Northwest Power Act, not whether the claimant has simply characterized its claim as one for breach of contract and for money damages, as Puget asserts. *E.g., id.*

In *Clark County*, the court determined that it lacked jurisdiction to entertain the breach of contract claim in that case because "the principal conduct of the agency on which petitioner's claim is based is not final action taken pursuant to statutory authority; it is alleged contractual commitments made outside the scope of any administrative record, and which petitioners contend have been breached." *Id.* at 650. This determination distinguishes *Clark County* from the case at bar. Here, Puget's claim is directly based upon a final action taken pursuant to statutory authority. As discussed above, Puget asserts in its complaint that BPA's sales of power outside of the Pacific Northwest violate the Regional Preference Act and section 9(c) of the Northwest Power Act, 16 U.S.C. §§ 837-837h; 16 U.S.C. § 839f(c).

Such claims founded upon final actions under the Act are within the exclusive jurisdiction of the Ninth Circuit. 16 U.S.C. §§ 839c(f), 839f(e)(1)(B), (G), (e)(5). Indeed, the *Clark County* court expressly reaffirmed that the court had properly exercised its exclusive jurisdiction in previously reviewing a number of alleged "breach of contract" actions that actually challenged final BPA actions under the Northwest Power Act. 855 F.2d at 649-50, *citing Pacific Power & Light Co. v. BPA*, 795 F.2d

810 (9th Cir. 1986); *Atlantic Richfield Co. v. BPA*, 818 F.2d 701 (9th Cir. 1987); *Pacificorp v. FERC*, 795 F.2d 816 (9th Cir. 1986); and *Seattle, City Light Dept. v. Johnson*, 813 F.2d 1364 (9th Cir. 1987).

In *CP Nat'l*, 876 F.2d 745, decided by the Ninth Circuit subsequent to the *Clark County* case, the court examined its jurisdictional analysis in *Clark County* and again reaffirmed that it had properly exercised its jurisdiction in reviewing alleged "breach of contract" actions that actually challenged final BPA actions under the Northwest Power Act. In *CP Nat'l*, investor-owned and publicly-owned utility customers of BPA, including Puget, alleged that BPA's inclusion of an availability charge in their rates constituted a breach of their power sales contracts with BPA. The Ninth Circuit, however, stated as follows:

> Petitioners argue that this court's decision in *Public Utility Dist. No. 1 of Clark County v. Johnson*, 855 F.2d 647 (9th Cir. 1988), signifies that the U.S. Claims Court is the exclusive forum for their claims, because petitioners now choose to characterize their claims as sounding in contract. They assert that the availability charges included in the 1983 rates constitute a "breach" of petitioners' power sales contracts with BPA.
>
> Despite the words used to characterize petitioners' grievance, however, its focus is on the 1983 rates. Neither the Pacific Northwest Power Act nor any of our decisions interpreting it support petitioners' argument that the Claims Court has jurisdiction over an action which calls for review of ratemaking by the BPA.

Id. at 747 (emphasis added). The court then expressly stated that its "recent decision in [*Clark County*], upon which petitioners rely, is not to the contrary," but "lends support to our exercise of jurisdiction here." *Id.* at 747.

The court explained that, in *Clark County*, the petitioner did not challenge a final action under the Act, "but BPA's refusal to purchase one of the utility's power resources," *Id.* at 748. The court, therefore, specifically reaffirmed the distinction between *Clark County* and the long line of cases cited above that, where the source of a claim is a challenge to final agency action under the Northwest Power Act, even though characterized as breach of contract, the action must be filed in the Ninth Circuit.

The Ninth Circuit's logic in *CP Nat'l* applies directly to this case. Ratemaking is only one of a number of expressly listed agency actions subject to exclusive judicial review in the Ninth Circuit. *See* 16 U.S.C. § 839f(e)(1). As discussed above, section 9(e)(1)(B) of the Northwest Power Act expressly provides that BPA's power sales under section 5 of the Act, including extraregional surplus sales pursuant to section 5(f), are final agency actions under the Act. 16 U.S.C. § 839f(e)(1). Puget's complaint here is based upon BPA's extraregional power sales and/or the implementation of those final actions. Thus, as in *CP Nat'l*, no matter how the action is characterized, the Ninth Circuit has exclusive jurisdiction to entertain what is in reality a challenge by Puget to a final action of BPA taken pursuant to statutory authority under the Northwest Power Act. *Clark County* and *CP Nat'l* simply affirm the Ninth Circuit's consistent holdings that where a party challenges a final action under the Northwest Power Act, the Ninth Circuit has exclusive jurisdiction to review such a claim, even though the claim is characterized as a breach of contract. Here, Puget argues that BPA's extraregional power sales are inconsistent with the Regional Preference Act and the Northwest Power Act and are, therefore, inconsistent with the contract. Thus, Puget's claim is a challenge to the lawfulness of agency action under the Northwest Power Act reviewable only in the Ninth Circuit.

In summary, the nature of the conduct chalienged here is that of a final agency action. Any inquiry into the

merits of this challenge will require a review of agency administrative actions involving the extraregional sales of power and the implementation procedures associated with these sales. The language of the Northwest Power Act, the intent of Congress in passing it, and the long and consistent line of cases interpreting that Act, lead to the conclusion that this Court lacks jurisdiction to hear and decide the merits of this case. Challenges to final actions, or implementations of final actions, taken by the BPA are to be exclusively reviewed by the United States Court of Appeals for the Ninth Circuit as specified in section 9(e) of the Northwest Power Act, 16 U.S.C. § 839f(e)(5). Since the Court finds that there is a want of jurisdiction over the plaintiff's action and believes that it would be in the interest of justice to do so, this case will be transferred to the Ninth Circuit pursuant to the authority contained in 28 U.S.C. § 1631.

CONCLUSION

For the reasons discussed above, the Government's motion to dismiss for lack of jurisdiction is granted, but in lieu of dismissal, this case is to be transferred to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1631. The clerk is directed to enter judgment accordingly.

Each party is to bear its own costs.

IN THE UNITED STATES CLAIMS COURT

No. 90-193 C

PUGET SOUND POWER & LIGHT CO.

v.

THE UNITED STATES

[Filed Apr. 30, 1991]

JUDGMENT

Pursuant to the opinion of April 30, 1991,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that this case is transferred to the United States Court of Appeals for the Ninth Circuit. Each party is to bear its own costs.

April 30, 1991

ROGER L. NIEMAN
Acting Clerk of Court

By: /s/ Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

IN THE UNITED STATES CLAIMS COURT

No. 90-193 C

PUGET SOUND POWER & LIGHT COMPANY,
a Washington corporation,
Plaintiff,

vs.

UNITED STATES,
Defendant.

COMPLAINT

[Received Mar. 1, 1990]

The Complaint of plaintiffs, by its attorneys, Perkins Coie, respectfully shows and alleges:

Jurisdiction

1. Jurisdiction is conferred on this Court by 28 U.S.C. § 1491. This claim is based on express written contracts with the United States.

The Parties

2. Plaintiff Puget Sound Power & Light Company ("Puget Power") is a corporation organized under the laws of the State of Washington with its principal place of business in Bellevue, Washington. Puget Power is an investor-owned public utility which provides electric service to retail customers wholly within the State of Washington.

3. The Bonneville Power Administration ("BPA") is an agency of the United States established under 16 U.S.C. § 832 *et seq.* and 42 U.S.C. § 7107 *et seq.*

The Contracts

4. As required by 16 U.S.C. §§ 837(f) and 839f(c), BPA includes in its contracts for sale or exchange of electric power provisions relating to the priority and preference of its Pacific Northwest customers to such electric power under Public Law 88-552 (16 U.S.C. § 837) and Public Law 96-501 (16 U.S.C. § 839) (hereinafter referred to as "Regional Preference Provisions").

5. Such Regional Preference Provisions guarantee BPA's Pacific Northwest customers first call on BPA's electric power over customers in other regions and limit the disposition of BPA electric power outside of the region to that which is surplus to the needs of BPA's Pacific Northwest customers.

6. Puget Power is one of BPA's Pacific Northwest customers and at all times material to this Complaint has had in effect, and presently has in effect, contracts with BPA for the sale or exchange of BPA electric power ("BPA Contracts") which contain Regional Preference Provisions.

7. Puget Power's BPA Contracts entered into prior to December 5, 1980, the effective date of P.L. 96-501, contain Regional Preference Provisions substantially in the following form:

Priority of Pacific Northwest Customers

(a) The provisions of the Act of August 31, 1964, 78 Stat. 756, P.L. 88-552 ("the Act") are by this reference incorporated herein.

(b) To further the policy of the Act, the Administrator agrees that the Utility, together with other utilities in the Pacific Northwest, shall have priority on electric power generated at federal hydroelectric plants in the Pacific Northwest in conformity with the provisions of the Act.

(c) The Administrator agrees that he will comply with all restrictions and requirements of the Act, and will perform all duties and obligations imposed on him by the Act, as the Act was approved on August 31, 1964, regardless of any modification, amendment or repeal of the Act.

(d) The Administrator further agrees that to the extent and at such times as may be necessary to meet demands for energy or peaking capacity at any established rate for use within the Pacific Northwest, he will exercise his rights under contractual provisions required by the Act to be included in contracts for the disposition of surplus energy or surplus peaking capacity for use outside of the Pacific Northwest, to require:

(1) the return of energy delivered in connection with his supplying peaking capacity for use outside the Pacific Northwest; and

(2) the delivery within the Pacific Northwest of energy, peaking capacity, or both, which he has the right to receive in any exchange for energy, capacity, or both, which he has delivered for use outside the Pacific Northwest.

A true and accurate copy of one of the contracts between Puget Power and the United States containing such provision is attached hereto as Appendix A.

8. Puget Power's BPA Contracts entered into after December 5, 1980, contain Regional Preference Provisions substantially in the following form:

Priority of Pacific Northwest Customers

(a) The provisions of sections 9(c) and (d) of P.L. 96-501 and the provisions of P.L. 88-552 as amended by section 8(e) of P.L. 96-501 ("the Provisions") are by this reference incorporated herein.

(b) To further the policy of the Provisions, Bonneville agrees that the utility, together with other utilities in the Pacific Northwest, shall have priority on electric power and energy Bonneville has available for sale, in conformity with the Provisions.

(c) Bonneville agrees that it will comply with all restrictions and requirements of the Provisions, and will perform all duties and obligations imposed on it by the Provisions, as the Provisions existed on the effective date of this agreement, regardless of any subsequent modification, amendment or repeal of the Provisions.

(d) Bonneville further agrees that to the extent and at such times as may be necessary to meet demands for energy or peaking capacity at any established rate for use within the Pacific Northwest, it will exercise its rights, under contractual provisions required by the Provisions to be included in contracts for the disposition of surplus energy or surplus peaking capacity for use outside of the Pacific Northwest, to require:

(1) the return of energy delivered in connection with its supplying peaking capacity for use outside the Pacific Northwest; and

(2) the delivery within the Pacific Northwest of energy, peaking capacity, or both, which Bonneville has the right to receive in any exchange for energy, capacity, or both, which it has delivered for use outside the Pacific Northwest.

A true and accurate copy of one of the contracts between Puget Power and the United States containing such provision is attached hereto as Appendix B.

BPA's Breaches of Contract

9. Commencing in 1982 and continuing through the date of this Complaint, BPA has been marketing electric power outside of the Pacific Northwest in flagrant disregard and breach of the Regional Preference Provisions contained in Puget Power's BPA Contracts as set forth above and thereby has deprived Puget Power of the preference and priority to BPA electric power which it is guaranteed under such contractual Regional Preference Provisions.

10. BPA's breaches include, without limitation, the following:

(a) Failure to guarantee to its Pacific Northwest customers, including Puget Power, first call on its electric power;

(b) Disposition of electric power outside of the Pacific Northwest which was not surplus to the needs of the Pacific Northwest or to the needs of Puget Power as a BPA Pacific Northwest customer;

(c) Disposition of electric power outside of the Pacific Northwest for which there was both a market and a demand in the Pacific Northwest, including a market and demand for such power on Puget Power's electric system as a BPA Pacific Northwest customer;

(d) Refusal to allow Puget Power to purchase or otherwise obtain at established rates BPA electric power which BPA was marketing outside of the Pacific Northwest to others;

(e) Conditioning Puget Power's acquisition of BPA's electric power on payment of the prices for such power which BPA was able to obtain by marketing it outside of the Pacific Northwest; and

(f) Marketing BPA's electric power outside of the Pacific Northwest to others before marketing it first

in accordance with the Regional Preference Provisions within the Pacific Northwest to its Pacific Northwest customers, including Puget Power.

11. Since 1982, Puget Power has diligently notified BPA that BPA's actions were in breach of the Regional Preference Provisions of Puget Power's BPA Contracts, but BPA has failed to correct or cure such breaches in spite of these notices. A true and accurate copy of a representative written notice sent by Puget Power to BPA in this regard is attached hereto as Appendix C.

12. BPA has responded to each such notice by rejecting Puget Power's claim. True and accurate copies of representative rejection notices sent by BPA to Puget Power in this regard are set forth in Appendix D hereto.

13. As a result of BPA's ongoing breaches of the Regional Preference Provisions of Puget Power's BPA Contracts since 1982, Puget Power has suffered, and continues to suffer, substantial damages. These damages include the costs to Puget Power of having to obtain more expensive electric power to replace the electric power which BPA has disposed of outside of the region and which should first have been marketed in the Pacific Northwest. Additionally, such damages include the lost net revenues which Puget Power would otherwise have been able to obtain if BPA had complied with the Regional Preference Provisions and marketed its electric power first to Pacific Northwest customers, including Puget Power, rather than disposing of such electric power outside of the region.

14. Puget Power has made inquiries of BPA, pursuant to Freedom of Information Act requests in compliance with 5 U.S.C. § 552, to obtain data upon which Puget Power could determine its total damages. BPA has failed to submit complete responses to those requests and has provided Puget Power with little relevant information. Puget Power believes, however, based upon data which it

does have, that its damages through the present are, at a minimum, in the range of twenty (20) million dollars.

Prayer for Relief

WHEREFORE, Puget Power requests that the Court enter judgment (1) in the amount of 20 million dollars or such other amount as may be proven at trial; (2) for such further damages accruing hereafter until trial; (3) for interest, costs, disbursements and attorneys' fees; (4) declaring that BPA may not in the future sell or exchange power in violation of the Regional Preference Provisions of its contracts with Puget Power; and (5) ordering such other relief as the Court may deem just and proper.

DATED this 28th day of February, 1990.

/s/ Sherilyn Peterson
SHERILYN PETERSON
Attorney for Plaintiff
Puget Sound Power & Light Company

POWER FOR PROGRESS—II

The New Program
of
BONNEVILLE POWER ADMINISTRATION
for
THE PACIFIC NORTHWEST

[BPA EMBLEM]

Updated Summary
of
Speeches and Statements
by

CHARLES F. LUCE
Bonneville Power Administrator

(Compiled as of March 30, 1962,
and supersedes compilation dated July 15, 1961)

From the Office of
Charles F. Luce, Administrator
Bonneville Power Administration
Post Office Box 3537
Portland 8, Oregon

Can Protective Legislation Be Amended?

The question has been asked many times in the Northwest, and with good cause, "But can't your protective legislation be amended?" The questioners point out that California has three times as many representatives in the House as does the Pacific Northwest. The answer is, yes, the legislation can be amended. Even the Constitution has been amended 22 times.

But I don't think this legislation would be amended, first, because while the Northwest is at a numerical disadvantage in the House this region has the advantage of numbers in the Senate and, second, we propose to go a step further and write the intent of this legislation into contracts with our customers.

The Constitution provides that you cannot take property without just compensation. If the legislation were amended, I don't believe our Northwest customers could use their contracts to get an injunction preventing us from selling power they need outside the Northwest. But they could use their contracts to go into the Court of Claims and collect damages for breach of contract by the United States. Those damages would be the difference between what alternative sources of power would cost and what the Bonneville rate might be at that time. I just don't believe, that as a practical matter, the Congress of the United States would pass laws breaking the government's word pledged in contracts, and exposing the government to such court claims for damages.

In any event, I cannot emphasize too greatly the facts that we do not now have any protection, that interties are going to be built, and that the proposed legislation will give the region the very best protection that can be had.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-7971, 83-7981

ATLANTIC RICHFIELD COMPANY, *et al.*,
Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION, *et al.*,
Respondents.

INTALCO ALUMINUM CORPORATION
Petitioner,

v.

PETER T. JOHNSON, *et al.*,
Respondents.

On Petitions for Review of Nonfinal Rate Determinations
of the Bonneville Power Administration

BRIEF FOR RESPONDENTS

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CHARLES H. TURNER
United States Attorney

JACK G. COLLINS
Chief, Civil Division

THOMAS C. LEE
Assistant United States Attorney

July 12, 1985

* * * *

The DSIs request a declaration that the customer charge component of BPA's IP-83 rate is invalid and that the IP-83 rate should be set aside. DSI br. at 51. The DSI action is a challenge to BPA's rates. This Court lacks jurisdiction to review challenges to BPA's rates until confirmed and approved by FERC. *Central Lincoln PUD, supra*; 16 U.S.C. § 839f(e)(4)(D). The IP-83 rate did not become final until June 28, 1985, when confirmed and approved by FERC. 32 FERC ¶ 61,014 (July 2, 1985). Each petition should therefore be dismissed without prejudice to refiling.

If the DSI action is based on alleged contract rights, the Tucker Act vests exclusive jurisdiction in the U.S. Claims Court. 28 U.S.C. §§ 1346(a)(2), 1491. *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485, n. 5 (9th Cir. 1985) (mandate stayed pending petition of certiorari to the U.S. Supreme Court). *See Pacific Power and Light v. BPA*, No. 84-4072, brief of BPA, pp. 18-81; *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967-68 (D.C. Cir. 1982) Tucker Act consent to contract suits against the United States antedates the Northwest Power Act and governs all contract actions against BPA. *See Pacific Power & Light v. BPA*, No. 84-4072, supplemental brief of BPA.

The Northwest Power Act did not withdraw or repeal the Tucker Act remedy as it applies to BPA contracts. *See Ruckelshaus v. Monstanto*, —— U.S. ——, 104 S.Ct. 2862, 2881 (1984). Likewise, there is no room for a holding that the Northwest Power Act duplicates the Tucker Act remedy. *North Side Lumber Co. v. Block, supra.* The Court lacks jurisdiction.

Monetary relief is clearly unavailable. This Court's jurisdiction over actions against the United States is limited by sovereign immunity. *North Side Lumber Co. v. Block, supra*, 753 F.2d at 1484, n. 3 (9th Cir. 1985). Section 9(e) of the Northwest Power Act does not waive BPA's immunity from suit for monetary relief. In speci-

fying the relief available under the Northwest Power Act, Congress specifically incorporated the review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *See* 16 U.S.C. §§ 839f(e)(1), 839f(e)(2); *Department of Water & Power v. BPA*, 759 F.2d 684, 690-91 (9th Cir. 1985). The waiver of sovereign immunity found in the APA is expressly limited to claims for "relief other than money damages", 5 U.S.C. § 702, and therefore precludes monetary relief. *Northside Lumber Co. v. Block*, *supra*, 753 F.2d at 1485, n. 5. Since monetary relief is unavailable under the APA it is also unavailable under the Nortwest Power Act.

* * * *

CONCLUSION

For the foregoing reasons, the two consolidated petitions should be dismissed.

Respectfully submitted,

HARVARD P. SPIGAL
General Counsel

/s/ John A. Cameron, Jr.
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Chief, Civil Division

THOMAS C. LEE
Assistant United States Attorney

July 12, 1985

IN THE UNITED STATES CLAIMS COURT

No. 90-193C

PUGET SOUND POWER & LIGHT CO.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

AFFIDAVIT OF SHERILYN PETERSON

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Sherilyn Peterson, being first duly sworn on oath, deposes and says:

1. I am a member of the law firm of Perkins Coie and counsel for plaintiff, Puget Sound Power & Light Company ("Puget"), in this action. I make this affidavit on my own personal knowledge.

2. Puget has diligently notified the Bonneville Power Administration ("BPA") of its belief that BPA has been violating regional preference provisions of its contracts with Puget. Examples of some of the letters Puget has writen to BPA on this subject were included in plaintiff's Complaint, Appendices C, D.

3. Puget has, on several occasions, discussed with BPA Puget's intent to file a lawsuit for damages arising out of BPA's breaches of its contracts with Puget. BPA's February 23, 1990 notice of an agency proceeding was filed by BPA in response to Puget's expressed intention to file this lawsuit.

4. Puget representatives have not participated in any workshops or meetings held by BPA in its agency proceeding.

5. Among the appendices to the Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss are true and accurate copies of the following documents:

(a) BPA, "Legislative History of the Pacific Northwest Electric Power Planning and Conservation Act" excerpts (March 1981)—Appendix C.

(b) Excerpts from brief (dated July 12, 1985) submitted by BPA to the Ninth Circuit Court of Appeals in *Atlantic Richfield Company v. Bonneville Power Administration*, 818 F.2d 701 (9th Cir. 1987)—Appendix D.

(c) Letter from Ken Billington, Washington Public Utility Districts' Association to Senator Henry M. Jackson (dated June 9, 1960), from the Henry M. Jackson Papers archived at the University of Washington, Seattle, Washington—Appendix E.

(d) BPA's paper titled "The Availability and Price of Surplus Power and Nonfirm Energy From the Bonneville Power Administration" (dated September 15, 1986), submitted to the California State Energy Resources Conservation and Development Commission, Docket No. 85-ER-6 —Appendix H.

(e) Two-page handout from a public session held by BPA in connection with its agency action on June 12, 1990 (which Puget obtained from one of the participants)—Appendix I.

(f) Letter from counsel for Puget to BPA (dated April 30, 1990) setting forth Puget's position regarding BPA's agency proceeding—Appendix K.

DATED this 4th day of August, 1990.

/s/ Sherilyn Peterson
SHERILYN PETERSON

SUBSCRIBED AND SWORN to before me this 4th day of August, 1990.

[SEAL]

/s/ Lynn Y. Sandahl
Lynn Y. Sandahl
Notary Public in and for the
State of Washington, residing
in County of King
My commission expires:
6/29/91

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 91-5094

PUGET SOUND POWER & LIGHT COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

AFFIDAVIT OF SHERILYN PETERSON

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Sherilyn Peterson, being first duly sworn on oath deposes and says:

1. I am the attorney of record for Puget Sound Power & Light Company, plaintiff-appellant in this action. I make this affidavit on my own personal knowledge.

2. Although the Claims Court judgment was dated April 30 and judgment was apparently entered that day, Puget received no notice of the judgment until Monday, May 6 when a copy of the judgment was received in the mail by my office. On that day, with the assistance of my firm's Washington, D.C. office, Puget immediately filed a Notice of Appeal in the Federal Circuit.

3. Puget did not receive any notice from the Claims Court that it was transferring the files to the Ninth

Circuit until Puget received, also by mail on May 6, a copy of the transmittal letter from the Acting Clerk of the Claims Court to the Ninth Circuit.

4. On May 6, 1991, I contacted the Ninth Circuit to determine whether it had yet received the file in *Puget Sound Power & Light Company v. United States*, No. 90-193C from the Claims Court. I was advised by both the Clerk's Office and the Agency Docketing Unit responsible for entering these cases into the Ninth Circuit docket that, as of the time of my calls, the papers had not yet arrived. Ninth Circuit personnel, however, offered to call me once the case was received and docketed.

5. I received a call on May 8, 1991 from the Ninth Circuit Agency Docketing Unit. I was advised that the papers had ultimately come in on May 6 and had been file stamped that date, but that the papers were not docketed until May 8. Court personnel in both the Agency Docketing Unit and the Clerk's Office advised that the docketing date is the date that the case actually is processed into the Ninth Circuit system, a Ninth Circuit file is opened and a cause number is assigned.

6. Shortly thereafter, I received from the Ninth Circuit a letter to counsel and attached case schedule confirming the May 8 docketing date.

7. In order to ensure that there is no question about the docketing date, I again called the Ninth Circuit after receiving BPA's motion. On June 17, 1991, I spoke with Christine Hill, Deputy Clerk for the Ninth Circuit. She checked the records and confirmed that the Ninth Circuit had docketed the action on May 8, 1991.

8. I submit herewith, in conformance with 28 U.S.C. § 1746, a declaration signed by Ms. Hill confirming that the docketing date was May 8, 1991.

9. I am admitted to practice in the Ninth Circuit and have handled numerous Ninth Circuit cases. It is com-

mon practice for the docketing date to follow the receipt/filing date of a case by several days.

10. I have inquired of the Claims Court whether it records the time papers are filed and specifically whether it had a record of the time Puget's Notice of Appeal was filed on May 6, 1991. The Claims Court advised that it does not record the time papers are received and the Claims Court file stamp on the Notice of Appeal does not indicate a time. I also inquired of the Ninth Circuit whether it records the time that papers are received. Similarly, the Ninth Circuit advised that it does not record the time and the records reflect no time.

11. The Notice of Appeal was in fact filed in the Claims Court before the papers were stamped in by the Ninth Circuit on May 6, 1991. I have reviewed my office telephone records for May 6, 1991 and find that the call I made to the Ninth Circuit's Agency Docketing Unit commenced at 1:43 p.m. (Pacific time) and lasted for five minutes. I then called the Clerk's Office at 1:49 p.m. (Pacific time) and spoke with court personnel there for over a minute-and-a-half. A true and accurate copy of my telephone records for May 6, 1991, is attached hereto as Exhibit A. During these telephone calls I was advised that, as of that time, the papers had not yet been received from the Claims Court. Thus, as of less than ten minutes before the close of business in Claims Court, the Ninth Circuit still had not received the transmittal papers.

12. I have inquired of my firm's Washington, D.C. office which filed the Notice of Appeal with the Claims Court on May 6, 1991. I am advised that the Notice of Appeal was filed by mid-afternoon, well before my telephone calls to the Ninth Circuit and the close of business in Claims Court.

/s/ Sherilyn Peterson
SHERILYN PETERSON

SUBSCRIBED AND SWORN TO before me this 21 day of June, 1991.

/s/ Carolyn F. Walker
Notary Public in and for the State of Washington, residing at Issaquah. My Commission Expires: 4-9-95

Date: 05/13/91 Perkins Coie—Extension Activity Detail

Review, Make Corrections, Return to Karen Rusquist [40-45H] Within 5 Working Days

Report Period: 04/26/91-05/10/91

Name: Peterson, Sherilyn

Extension: 7332

Date	Time	Duration	Charge	Number Called	Place	Billing No.
05/01/91	16:34	00:05:26	2.02	302-227-6296	DE	09901-0999
05/06/91	09:24	00:00:38	0.34	202-628-6600	DC	07772-0482
05/06/91	09:27	00:00:44	0.34	202-628-6600	DC	07772-0482
05/06/91	13:09	00:01:32	0.68	202-628-6600	DC	07772-0482
05/06/91	13:43	00:05:08	1.08	415-556-6123	CA	07772-0482
05/06/91	13:44	00:01:38	0.62	415-556-8011	CA	07772-0482
05/07/91	11:22	00:15:38	9.41	313-538-6808	RI	12418-0002
05/09/91	16:54	00:02:20	1.02	617-666-2082	MA	09901-0013
05/10/91	09:58	00:00:44	0.29	503-222-0577	OR	09901-0001
05/10/91	15:20	00:02:20	1.22	509-455-6008	MA	07772-0407
		TOTAL:	30.01			

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 91-5094

PUGET SOUND POWER & LIGHT COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

DECLARATION OF CHRISTINE HILL

CHRISTINE HILL, declares under penalty of perjury under the laws of the State of California:

1. I am a Deputy Clerk employed by The United States Court of Appeals for the Ninth Circuit.

2. I have reviewed the file in Puget Sound Power v. BPA, Ninth Circuit No. 91-70295.

3. That case was docketed in the Ninth Circuit on May 8, 1991. The May 8th docketing date is reflected on the attached Letter to Counsel and Time Schedule Order prepared and filed on the date of docketing.

DATED this 17 day of June, 1991 at
San Francisco, California.

/s/ Christine Hill
CHRISTINE HILL

(2)

No. 91-714

In the Supreme Court of the United States

OCTOBER TERM, 1991

PUGET SOUND POWER & LIGHT COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioner's appeal from an uncertified interlocutory transfer order.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-714

PUGET SOUND POWER & LIGHT COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a, 8a) is unreported, but the decision is noted at 942 F.2d 912 (Table). The opinion of the United States Claims Court (Pet. App. 9a-52a) is reported at 23 Cl. Ct. 46.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1991. The opinion was amended on September 4, 1991, and a revised mandate issued on October 2, 1991 (Pet. App. 8a). The petition for a writ of certiorari was filed on October 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the appealability under the collateral order doctrine of an interlocutory transfer order of the Claims Court. The court determined that it lacked jurisdiction over an action and transferred it to the United States Court of Appeals for the Ninth Circuit, the court in which the Claims Court determined jurisdiction would lie.

The underlying dispute in this case involves certain administrative actions of the Bonneville Power Administration (BPA), an agency within the Department of Energy. BPA markets power from 30 federal hydroelectric projects and two nuclear power plants in the Pacific Northwest; these projects and plants are known collectively as the Federal Columbia River Power System. In some circumstances, BPA sells power outside the Pacific Northwest region.

BPA's functions as a federal power marketing agency are largely governed by the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697, which is known as Northwest Power Act or Regional Act and is codified at 16 U.S.C. 839-839h. See *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 383-386 (1984).[1] As pertinent here, the Northwest Power Act authorizes the Administrator of BPA to sell "power * * * that is surplus to his obligations" under other provisions. 16 U.S.C. 839c(f). That authority must be exercised "in accordance with this and other Acts applicable to the Administrator, including * * * the Act of August 31,

[1] In addition to the Northwest Power Act, there are other statutes applicable to BPA's functions and operations, which, other than the Regional Preference Act, are not relevant to this petition for certiorari.

1964 (16 U.S.C. 837-837h)." 16 U.S.C. 839c(f). Another provision requires that all BPA contracts "for the sale or exchange of electric power for use outside the Pacific Northwest * * * shall be subject to limitations and conditions corresponding to those provided in sections 2 and 3 of the Act of August 31, 1964 (16 U.S.C. 837a and 837b)." 16 U.S.C. 839f(c). The Act of Aug. 31, 1964, Pub. L. No. 88-552, 78 Stat. 756 (16 U.S.C. 837-837h), which is commonly referred to as the Regional Preference Act, also applies (in conjunction with the Northwest Power Act) to BPA's power sales outside the Pacific Northwest region.

Under the Northwest Power Act, BPA "sales, exchanges, and purchases of electric power" are deemed to be administrative "final actions" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701-706. 16 U.S.C. 839f(e). Relatedly, all "[s]uits to challenge [such] final actions * * * or the implementation of such final actions" are within the exclusive jurisdiction of the United States Court of Appeals for the Ninth Circuit. 16 U.S.C. 839f (e)(5).

In 1981, pursuant to the Northwest Power Act, BPA offered initial power sales contracts to its regional customers. 16 U.S.C. 839c(g)(1). Numerous BPA utility customers, including petitioner Puget Sound Power & Light Company, executed power sales contracts offered pursuant to this provision. See *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, *supra*. Appended to these and other subsequent BPA power sales contracts were generic "General Contract Provisions" that incorporated by reference the provisions of the Regional Preference Act and Sections 839f(c) and 839f(d) of the Northwest Power Act.

2. On March 1, 1990, approximately one week after BPA had initiated an administrative rulemaking proceeding that was intended to develop a formal policy governing BPA's extra-regional power sales, see 55 Fed. Reg. 6420 (1990),[2] petitioner filed the present case in the United States Claims Court. Petitioner's complaint contended that BPA breached contracts with it by marketing power outside of the Pacific Northwest region in contravention of the Northwest Power Act, 16 U.S.C. 839f(c), and the Regional Preference Act, 16 U.S.C. 837-837h. Petitioner sought money damages based upon the agency's purported violation of the two statutes, as well as declaratory relief "that BPA may not in the future sell or exchange power in violation of the Regional Preference Provisions of its contracts with Puget Power." Pet. App. 56a-60a.

The government moved to dismiss the complaint for lack of jurisdiction. The Claims Court agreed with the government that petitioner's claims constituted a "challenge[] [to] final agency action" as set forth in the Northwest Power Act. Pet. App. 51a. The Claims Court explained that the statute provides an exclusive forum in the Ninth Circuit for petitioner's claims, and preempts any more general statutory remedy that might otherwise have been available under the Tucker Act, 28 U.S.C. 1491. Pet. App. 30a-34a, 48a-52a. Thus, the Claims Court concluded

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[2] This rulemaking proceeding, which was initiated on February 23, 1990, was intended to review BPA's historical practices regarding extra-regional power sales, and to develop a formal policy governing those sales. See 55 Fed. Reg. 6420 (1990). Subsequently, BPA published a notice establishing the scope of issues to be addressed in the proceeding, see 56 Fed. Reg. 40,881 (1991), which remains pending today.

> [a]ny inquiry into the merits of this challenge will require a review of agency administrative actions involving the extraregional sales of power and the implementation procedures associated with these sales. * * * Challenges to final actions, or implementations of final actions, taken by BPA are to be exclusively reviewed by the United States Court of Appeals for the Ninth Circuit as specified in section 9(e) of the Northwest Power Act, 16 U.S.C. 839f(e)(5).

Id. at 51a-52a. In lieu of dismissal, however, the Claims Court ordered transfer of the proceeding to the Ninth Circuit pursuant to 28 U.S.C. 1631.

3. Petitioner appealed the Claims Court's order to the United States Court of Appeals for the Federal Circuit. The government filed a motion to dismiss on the ground the appeal sought review of a nonappealable, uncertified, interlocutory order, and therefore did not come within the Federal Circuit's jurisdiction. See 28 U.S.C. 1292(d)(2). The court of appeals agreed, and dismissed the appeal. Pet. App. 1a-4a, 8a. The court of appeals rejected petitioner's argument that review was proper under the collateral order doctrine, finding that the Claims Court's order was effectively reviewable in the transferee court. *Ibid.*

ARGUMENT

The court of appeals' conclusion that the collateral order doctrine is inapplicable is consistent with the decisions of this Court, and, subject to one arguable exception, with those of the other courts of appeals that have considered the issue. Review by this Court is therefore unwarranted.

1. It is fundamental that because interlocutory orders do not satisfy the statutory requirement of finality, they generally are not appealable prior to final judgment. *E.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). The collateral order doctrine, which is an exception to this general rule, permits immediate appeal of a limited class of interlocutory orders. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949); *Stringfellow* v. *Concerned Neighbors In Action*, 480 U.S. 370, 375 (1987). The only issue in this case is whether the Claims Court's order transferring the case to the Ninth Circuit is "effectively unreviewable on appeal." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).[3]

This Court has determined that an interlocutory order meets this stringent test only "where denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 376 (1981), quoting *United States* v.

---

[3] *Coopers & Lybrand*, 437 U.S. at 468, described the three factors that must be present in order for an interlocutory order to be appealable under the collateral order doctrine: Such an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." The court of appeals addressed only the third factor, apparently assuming that the first two were satisfied. Pet. App. 2a-3a.

Ryan, 402 U.S. 530, 533 (1971); accord *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495 (1989). The relevant inquiry focuses on whether review at any point will be available, not on the practical effects on the litigation of the interlocutory order. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (no collateral order review of order decertifying a plaintiff class, which had the effect of ensuring that the underlying litigation would be dropped); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981) (no collateral order review of order denying a motion to disqualify counsel).

The court of appeals recognized the stringency of the test set forth by this Court, Pet. App. 3a, and correctly concluded that effective review of the Claims Court's order is available in the Ninth Circuit. The transfer order in this case is not effectively unreviewable because "[t]he Ninth Circuit may examine whether it has jurisdiction over the case, sua sponte, or by a motion to dismiss. In addition, Puget Sound may obtain review of the jurisdictional issue by moving the Ninth Circuit, the transferee court, to retransfer the case to the Claims Court." Pet. App. 4a. In fact, petitioner currently has pending in the Ninth Circuit a motion to retransfer this case to the Claims Court. The arguments raised by petitioner in that motion are identical to those previously presented to the Claims Court.[4] The Ninth Circuit's consideration

[4] Petitioner complains that the transferee court in this case is an appellate court, rather than a trial court. That circumstance works to petitioner's advantage, however, in that petitioner is thus able in effect to gain relatively immediate appellate treatment of the jurisdictional issue. If, on the other hand, the Ninth Circuit agrees that it has exclusive jurisdiction over petitioner's claims, review in the Ninth Circuit is all to which petitioner was entitled in any event. See *Pacific*

of petitioner's retransfer motion will provide effective review of the jurisdictional issue for purposes of the collateral order doctrine.[5]

2. Petitioner claims that the courts of appeals have adopted conflicting positions on the appealability of transfer orders under Section 1631. The asserted conflict does not, however, indicate any difference in approach among the courts of appeals. The differing results in the cases to which petitioner points are the product of the fact-specific determinations regarding whether all review was effectively foreclosed by the transfer orders in those cases.

Power & Light Co. v. *Bonneville Power Administration*, 795 F.2d 810, 816 (9th Cir. 1986) (holding that the substance of a claim against BPA, rather than the label attached to it by the claimant, determines the proper forum for deciding the claim).

[5] Review may be impossible, for example, when a district court dismisses a party, stripping the district court of diversity jurisdiction and leaving the adversely-affected party with no potential for review whatsoever. See *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). Contrary to petitioner's contention (Pet. 19-21), that is not the situation in this case. Unlike in *Waco*, the trial court here did not pass on the substance of petitioner's claims, but merely identified the nature of those claims for purposes of determining subject-matter jurisdiction. Petitioner further claims (*ibid.*) that, as was the case in Waco, the Claims Court's decision to "dismiss" for lack of jurisdiction at the same time it decided to transfer the case to the Ninth Circuit makes the order final and appealable. Putting aside the fact that the *Waco* court remanded to state court after dismissing the only diverse party (on substantive grounds), petitioner's contention proves too much. Every Section 1631 transfer by definition requires the transferring court to conclude that it lacks jurisdiction; it is, however, "established that a transfer order is interlocutory and generally not appealable under the collateral order doctrine." Pet. App. 3a.

As petitioner notes (Pet. 10), three circuits have held that transfer orders under Section 1631 generally are not subject to immediate appeal under the collateral order doctrine. See, *e.g.*, *Persyn* v. *United States*, 935 F.2d 69, 72-73 (5th Cir. 1991); *Alimenta (USA), Inc.* v. *Lyng*, 872 F.2d 382, 384-85 (11th Cir. 1989); *Raines* v. *Block*, 798 F.2d 377, 379 (10th Cir. 1986). In each of these cases, the courts held that effective review after the transfer was available.

Petitioner contends that this line of cases is in conflict with a competing line, under which Section 1631 transfer orders come within the collateral order doctrine. See *Foster* v. *Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.), cert. denied, 112 S. Ct. 302 (1991); *Gower* v. *Lehman*, 799 F.2d 925 (4th Cir. 1986); *McLaughlin* v. *Arco Polymers, Inc.*, 721 F.2d 426 (3d Cir. 1983); *Goble* v. *Marsh*, 684 F.2d 12 (D.C. Cir. 1982); *Untalan* v. *Calvo*, 381 F.2d 228 (9th Cir. 1967). Contrary to petitioner's assertion, these cases fall short of demonstrating a conflict in authority warranting this Court's review.

In *Foster* v. *Chesapeake Ins. Co.*, *supra*, and *McLaughlin* v. *Arco Polymers, Inc.*, *supra*, the transfer orders at issue were from federal district courts to *state* courts, and the Third Circuit held that they were immediately appealable because no further review within the federal court system of any kind was available. Similarly, the transfer order in *Untalan* v. *Calvo*, *supra*, was from a federal district court to the Island Court of Guam; in that situation further review of any sort within the federal court system was impossible. Finally, *Goble* v. *Marsh*, *supra*, was a case in which there was concurrent jurisdiction in the district court and the Court of Claims, and jurisdiction in the transferee court (the Court of Claims) was proper whether or not the transfer order was in

error; thus, absent interlocutory review the transfer order would have escaped any review because any error would have been harmless.[6]

Thus, the conflict in authority on which petitioner relies is more apparent than real. The differing results to which petitioner points are the consequence of different courts applying the established standard to particular factual circumstances; in some instances, all further review was foreclosed and the collateral order doctrine was applicable, and in others it was not.

We acknowledge, however, that the Fourth Circuit's decision in *Gower* v. *Lehman*, 799 F.2d 925 (1986), is out of step with the weight of authority. In *Gower*, the court of appeals held that an order under Section 1631 transferring an action from district court to the Claims Court was immediately appealable under the collateral order doctrine because it was otherwise effectively shielded from review. The *Gower* court simply stated its conclusion without considering whether effective review might be available through a motion to dismiss, or a motion to retransfer the action to the district court. *Gower* has been questioned on these grounds. See *Persyn*, 935 F.2d at 73. Moreover, the only judicial authority relied upon by *Gower* for the proposition that a Section 1631 transfer order is effectively unreviewable was the D.C. Circuit's decision in *Goble*, which as we have noted is distinguishable (and has been repeatedly distinguished) on the ground that in that case review on

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[6] Courts that have held, based on the facts presented by particular cases, that Section 1631 orders were not subject to interlocutory appeal have repeatedly distinguished *Goble* on this basis. See *Persyn*, 935 F.2d at 73; *Alimenta*, 872 F.2d at 384; *Raines*, 798 F.2d at 379; *Jesko* v. *United States*, 713 F.2d 565, 568 (10th Cir. 1983).

appeal from the transferee court would have been ineffective because any error in transferring the action was inconsequential. Nor, to our knowledge, has any court—including the Fourth Circuit—followed *Gower* in a subsequent case.[7] In view of the failure of *Gower*'s erroneous analysis to generate a recurring conflict among the circuits, there is no need for this Court to grant review in this case to address the minor deviation in authority represented by that case.

3. Nor is review needed to resolve an important or recurring question. As petitioner notes (Pet. 10-14), transfer orders are common. It does not follow, however, that the issue of whether uncertified transfer orders are subject to immediate interlocutory appeal is a recurring question for purposes of evaluating the need for this Court to exercise its discretionary jurisdiction. All that is at stake in this case is the reviewability of a transfer order from the Claims Court. While petitioner asserts that such orders are common (Pet. 12-13 nn.4, 5), petitioner points to nothing that indicates either that the Claims Court commonly errs in ordering such transfers, or, more importantly, that parties are ever denied effective review of such orders.

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[7] We are unaware of any Fourth Circuit decisions subsequent to *Gower* considering the appealability of a Section 1631 transfer order. In *In re International Precious Metals Corp.*, 917 F.2d 792 (4th Cir. 1990), the court denied a petition for a writ of mandamus seeking to direct a transfer; in a criminal case, *United States* v. *Blackwell*, 900 F.2d 742, 746-747 (1990), the Fourth Circuit declined to exercise collateral order jurisdiction to review the district court's refusal to retransfer the proceeding. Although both cases involved somewhat different issues than were presented in *Gower*, it is worth noting that neither even cited *Gower*.

Moreover, Congress has specifically addressed the converse of the question presented here, *i.e.*, the circumstances in which interlocutory review of orders transferring cases *to* the Claims Court may be obtained. 28 U.S.C. 1292(d)(4)(A). Petitioner argues (Pet. 16-19) that the enactment of Section 1292(d)(4)(A) supports the conclusion that transfer orders *from* the Claims Court are amenable to interlocutory review. As the court of appeals correctly concluded (Pet. App. 3a), however, if anything may be inferred from the enactment of Section 1292(d)(4)(A), it is the opposite of what petitioner urges. Where Congress intends for a litigant to be able to obtain an interlocutory appeal of a transfer order, Section 1292(d)(4)(A) demonstrates that it knows how to provide expressly for that review. See also 28 U.S.C. 1292(a)(1)-(3) and (c)(1)-(2). It has not done so here.

Contrary to petitioner's suggestion (Pet. 13), there is no realistic specter of "jurisdictional ping pong" presented here. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988). In *Colt Industries* the Court held that an initial transfer decision should be viewed as the law of the case by the transferee court, which allows such a case to proceed promptly in the transferee court. Absent a finding by the transferee court that the transfer order was not plausible or clearly erroneous, it should not retransfer such a case. *Id.* at 815-819. Petitioner urges that the Ninth Circuit and the Claims Court may engage in jurisdictional "ping pong," with each repeatedly disclaiming jurisdiction and transferring the case to the other.

We first point out that the first round of "ping pong" that petitioner anticipates is one that it is currently seeking—retransfer from the Ninth Circuit to

the Claims Court. Should petitioner succeed in persuading the Ninth Circuit to retransfer the case, there is no reason to suppose that the Claims Court will not consider the case at that stage. Moreover, even if the Claims Court continued to refuse to exercise jurisdiction, it is even more speculative to think that it would again transfer the case rather than dismiss it for lack of jurisdiction (at which point direct review would be available in the Federal Circuit). Finally, even if the Claims Court persisted in its view that it lacks jurisdiction *and* again transferred the case to the Ninth Circuit, petitioner would still be able to request certification of that transfer order for immediate review in the Federal Circuit (an avenue which we note petitioner chose not to follow in the first stage of this litigation.) In short, the jurisdictional "ping pong" that petitioner posits is highly speculative, and in the unlikely event that it were to come to pass, petitioner would have ample opportunity for review at that time.

4. There is no merit to petitioner's contention (Pet. 21-25) that certiorari is necessary at this time in order to preserve its contract claims against BPA. If the Ninth Circuit declines to retransfer the case it will decide the merits of the underlying question of whether petitioner's complaint is for declaratory relief under the APA or for breach of contract.[8] Petitioner will thus have received review by an appellate tribunal of the underlying substantive question in this case. If petitioner is dissatisfied with the Ninth Circuit's resolution of that issue, it can seek certiorari at that stage. See *Colt Industries*, 486 U.S. at 817-

[8] Alternatively, if the Ninth Circuit believes that the Claims Court clearly erred in transferring the case, petitioner will be back in the latter court pursuing its contract claims.

818. In short, there is no basis for petitioner's contention that its asserted contract claims will be forever lost if this Court does not grant review at this time.

5. Finally, additional factors unique to this case militate against review. Under the Northwest Power Act, decisions to offer, execute, and implement contracts constitute final agency action that is subject to direct review in the Ninth Circuit. 16 U.S.C. 839f(e). Thus, this case presents the highly unusual situation in which a trial court's transfer order places a case in an appellate court. The Ninth Circuit's consideration of petitioner's retransfer motion will in effect provide review of the Claims Court's decision to transfer the case. Although we agree that a transferee court ordinarily cannot directly review the propriety of a transfer order (Pet. 15-16), petitioner cites no authority in which this principle was applied where the immediate transferee court was an appellate court.[9] Because of the strange posture in which this case arises, it would not be an appropriate vehicle for resolving the question whether interlocutory appeals from Section 1631 transfers are generally permissible.[10]

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[9] The normal practice is to require a motion for retransfer in the trial court to which the action was transferred, with appellate review of that trial court's disposition of the retransfer motion.

[10] An additional factor making this case unusual is the practical problem that the record was physically transferred from the Claims Court to the Ninth Circuit. See Pet. 7-8 n.1; Pet. App. 69a-71a. Although it appears that petitioner's notice of appeal was filed in the Claims Court before the record was docketed in the Ninth Circuit, it is unclear whether the Federal Circuit was in a position to direct the Claims Court to recover the record from the Ninth Circuit; it is even more uncertain that the Federal Circuit would have

Petitioner complains (Pet. 15-16) that it will have no appeal as of right from the Ninth Circuit's resolution of the retransfer motion. This overlooks two factors. First, the Ninth Circuit itself is an appellate court that has considerable expertise in interpreting the Northwest Power Act. See *Public Utility District No. 1* v. *Johnson*, 855 F.2d 647 (1988). Indeed, in that case—where the Ninth Circuit refused to take jurisdiction over a claim that it determined to be in the nature of a contract claim rather than a challenge to final agency action within the meaning of the Act—the Ninth Circuit proved itself responsive to the type of jurisdictional arguments pressed by petitioner in this case. Second, petitioner's argument is inconsistent with this Court's admonition that an order is effectively unreviewable under the collateral order doctrine only if the failure to permit an immediate appeal will "render impossible any review whatsoever." *Firestone Tire & Rubber Co.*, 449 U.S. at 376. As the court of appeals held, the Ninth Circuit's consideration of petitioner's retransfer motion (as well as its consideration of its own jurisdiction) will pro-

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taken that unusual step and that the Ninth Circuit would have agreed. See *Glasstech, Inc.* v. *AB Kyro OY*, 769 F.2d 1574, 1576-1578 (Fed. Cir. 1985); *In re Sosa*, 712 F.2d 1479, 1480 (D.C. Cir. 1983); *Starnes* v. *McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974). Because the notice of appeal was filed prior to the record's docketing in the Ninth Circuit, it appears that the Federal Circuit retained jurisdiction (for the purpose of determining jurisdiction) to decide petioner's appeal. Cf. *Starnes* v. *McGuire*, *supra* (docketing of appeal as well as filing of notice of appeal is necessary to preserve jurisdiction). The practical difficulty remains, however, that the Ninth Circuit now has the case and is considering petitioner's motion to retransfer.

vide effective review for purposes of the collateral order doctrine. See Pet. App. 4a.

In sum, petitioner overstates both the consequences of the Federal Circuit's decision and the extent to which the courts of appeals are in conflict over the inherently fact-specific inquiry whether particular transfer orders are effectively unreviewable. Far from being "an embarrassment to this Court" (Pet. 25), the decision below is correct, and does not call for this Court to resolve this "fact-specific jurisdictional dispute[] that lack[s] national importance." *Colt Industries*, 486 U.S. at 819.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45273